

Brooklyn Law Review

Volume 72 | Issue 4

Article 2

2007

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Recommended Citation

Dora W. Klein, *Categorical Exclusions from Capital Punishment: How Many Wrongs Make a Right?*, 72 Brook. L. Rev. (2007).
Available at: <https://brooklynworks.brooklaw.edu/blr/vol72/iss4/2>

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Categorical Exclusions from Capital Punishment

HOW MANY WRONGS MAKE A RIGHT?

Dora W. Klein[†]

INTRODUCTION

Plenty is wrong with capital punishment. Even for people who support the death penalty in principle, many reasons exist to oppose the actual, real-world operation of this punishment.¹ One well-noted problem is that defendants who are poor, or black, or whose victims were white, are disproportionately likely to be sentenced to death.²

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¹ People who for pragmatic reasons oppose the death penalty comprise a growing segment of the abolitionist movement:

A new group of abolitionists is emerging. These new abolitionists are not particularly interested in the philosophical, theoretical, or theological debate about the propriety of capital punishment. Rather, they have concluded that regardless of whether one believes that the government has the right to take life as an abstract matter, one cannot support the death penalty given the practical issues surrounding the unfairness and inaccuracy of its implementation.

Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. LAW 573, 576 (2004); see also Louis D. Bilionis, *The Unusualness of Capital Punishment*, 26 OHIO N.U. L. REV. 601, 601 (2000) (noting that current "public criticism does not dwell on the morality of the death penalty as an abstract concept, but instead raises sharp questions about the fundamental justice of the death penalty as a real, operating social institution").

² The seminal article on indigent capital defendants' attorneys is Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994) ("Poor people accused of capital crimes are often defended by lawyers who lack the skills, resources, and commitment to handle such serious matters. . . . It is not the facts of the crime, but the quality of legal representation, that distinguishes this case, where the death penalty was imposed, from many similar cases, where it was not." (footnotes omitted)). For more recent scholarship on indigent defense, see Ronald F. Wright, *Parity of Resources for Defense*

Additionally, commentators have observed that appellate consideration of death sentences suffers from both too much emphasis on procedural rules and too little opportunity for meaningful review.³ Moreover, the Supreme Court has insisted

Counsel and the Reach of Public Choice Theory, 90 IOWA L. REV. 219, 265 (2004) (“Year after year, in study after study, observers find remarkably poor defense lawyering that remains unchanged by this constitutional doctrine [established by *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Strickland v. Washington*, 466 U.S. 668 (1984)], and they point to lack of funding as the major obstacle to quality defense lawyering.”); Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1731 (2005) (“Many courts have been hesitant to acknowledge the ways in which the realities of indigent defense affect the assistance a defendant actually receives.”).

Concerning race and the death penalty, perhaps the most (in)famous consideration of this issue is the Supreme Court’s decision in *McClesky v. Kemp*. 481 U.S. 279 (1987). In this case, the Court accepted as valid several findings of “the Baldus study,” including that “defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks” and that “black defendants were 1.1 times as likely to receive a death sentence as other defendants.” *Id.* at 287. The Court nevertheless rejected McClesky’s equal protection claim because he failed to prove that “race was a factor in [his] particular case.” *Id.* at 308; see also David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983) (presenting the study’s full data). For recent discussions of race and the death penalty, see David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1423-26 (2004) (discussing race-of-defendant and race-of-victim effects); Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1, 19-25 (2005) (discussing the greater likelihood of receiving a death sentence for the murder of a white victim than for the murder of an African American or Hispanic victim); see also Nancy J. King, *How Different is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 204 (2004) (“There is considerable support for the claim that those who kill white victims are more likely to receive a death sentence than similarly situated murderers who kill non-white victims, although several studies suggest that the race of either the defendant or the victim may carry less significance for the jury’s sentencing decision than it does for the prosecutor’s charging and bargaining decisions.”).

³ See, e.g., Joseph L. Hoffmann, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court’s Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 IND. L.J. 817, 818 (1993) (calling “misguided” the Supreme Court’s “jurisprudential choice to treat the Eighth Amendment as a ‘super due process clause,’ rather than as an invitation for the federal courts to review the merits of individual state-imposed death sentences” (footnote omitted)); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 403 (1995) [hereinafter Steiker & Steiker, *Sober Second Thoughts*] (concluding that the Supreme Court’s death penalty decisions “have produced a complicated regulatory apparatus that achieves extremely modest goals with a maximum amount of political and legal discomfort”); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 794 (2002) (“An array of procedural barriers to habeas corpus review has been crafted carefully, while basic questions of fairness and justice go unexamined. Although it would be comforting to believe that habeas corpus and other court processes guard against unjust executions, the sad reality is that the review procedures in capital cases are unmoored by any enduring commitment to heightened scrutiny or careful deliberation.”).

that only “the worst of the worst” may be executed for their crimes,⁴ yet the Court has provided little guidance about what exactly ought to qualify someone for inclusion in this supposedly select group of death penalty-eligible offenders.⁵ This failure to articulate any defining principles for the “worst of the worst” category of offenders has allowed legislatures to enact death penalty statutes that are so encompassing as to not really limit eligibility for this punishment at all.⁶ And in the past thirty years, the convictions of dozens of people on death row have been reversed,⁷ raising the distinct possibility that an

⁴ See *Kansas v. Marsh*, 126 S. Ct. 2516, 2543 (2006) (Souter, J., dissenting) (stating that “within the category of capital crimes, the death penalty must be reserved for ‘the worst of the worst’” (citing *Roper v. Simmons*, 543 U.S. 551, 568 (2005))); *Roper*, 543 U.S. at 568 (“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution’” (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002))); see also Dean A. Strang, *The Rhetoric of Death*, 1998 WIS. L. REV. 841, 853 (describing “the Court’s insistence” that capital sentencing schemes ensure that death “is reserved for the worst of the worst”); Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts After Pulley v. Harris*, 70 U. COLO. L. REV. 813, 866 (1999) (“[T]he Court assumed that by appropriately narrowing death eligibility . . . the death penalty could adequately be reserved for the ‘worst of the worst.’”); Note, *The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599, 1604 n.40 (2001) (“Like the phrase ‘death is different,’ ‘the worst of the worst’ peppers death penalty literature.” (citing Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on “Eye for Eye” and the Death Penalty*, 1998 UTAH L. REV. 505, 524 (“The capital punishment schemes in this country purport to recognize that only the worst of the worst should receive the death penalty.”))).

⁵ See Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From Brown to Miranda, Furman and Beyond*, 54 VAND. L. REV. 359, 409 n.256 (2001) (“The Supreme Court has not required significant narrowing and has not suggested that the narrowing must build on any particular substantive theory.”).

⁶ See Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today’s Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 391 (1998) (“The Supreme Court’s failure to require state legislatures and courts to develop clear lines has resulted in the modern arbitrary use of capital punishment.”); Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS AND CULTURE* 82 (Austin Sarat ed., 1999) (“[N]ew aggravating circumstances have been added to capital statutes, like Christmas tree ornaments. These new factors reveal a process self-consciously freed from the dictates of substantive Supreme Court review.”); Steiker & Steiker, *Sober Second Thoughts*, *supra* note 3, at 373 (“[T]he Court has approved aggravating circumstances that arguably encompass every murder, such as Arizona’s circumstance that asks whether the defendant committed the offense in an ‘especially heinous, cruel or depraved manner’ and Idaho’s circumstance that asks whether ‘[b]y the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.’” (footnotes omitted)).

⁷ See Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 529 (2005) (reporting seventy-four exonerations of death-row prisoners between 1989 and 2003); Steven J. Mulroy, *The Safety Net: Applying Coram Nobis Law to Prevent the Execution of the Innocent*, 11 VA. J. SOC. POL’Y & L. 1, 3 (2003) (“Since 1973, 111 persons sentenced to death have been

innocent person might someday be—or might already have been—executed.⁸

Given such wrongs, it is tempting to regard as right any court decision that limits capital punishment's reach. Less of a bad thing is, all else being equal, a good thing. What if, however, a capital punishment-limiting decision possesses wrongs of its own? Two recent Supreme Court decisions, *Roper v. Simmons* and *Atkins v. Virginia*, raise this very question.⁹ Both decisions limit the death penalty—*Roper* excludes from this punishment offenders who committed their crimes before they were eighteen years old and *Atkins* excludes offenders who are mentally retarded. But in both cases, the Supreme Court overstated the uniformity and universality of traits associated with diminished culpability among juvenile and mentally retarded offenders.¹⁰ Contrary to the impression the Court conveys in *Atkins* and *Roper*, not all offenders whom these decisions exclude from the death penalty are necessarily less culpable for their crimes than are the offenders who remain subject to this punishment.

Do the wrongs of capital punishment nevertheless make the Court's decisions in *Atkins* and *Roper* right? This Article proposes that answering this question requires considering the implications not only for the offenders whom these decisions exclude from capital punishment but also for those offenders who are still included. While *Roper* and *Atkins* quite clearly

released because of factual innocence." (footnote omitted)). Additionally, the Death Penalty Information Center maintains a list of exonerations. Death Penalty Info. Ctr., *Innocence and the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6> (last visited Mar. 27, 2007) ("Since 1973, 123 people in 25 states have been released from death row with evidence of their innocence.").

⁸ This possibility, even more than any of the other problems, seems to be especially alarming for death penalty supporters. For example, in 2000, Illinois Governor George Ryan imposed a moratorium on executions in part because of his state's "troubling track record of exonerating more Death Row inmates than it has executed." Steve Mills & Ken Armstrong, *Governor to Halt Executions*, CHI. TRIB., Jan. 30, 2000, at 1, cited in Stevenson, *supra* note 3, at 372 n.146; see also Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448, 1462 (1998) (citing evidence that "the risk of executing innocent defendants is important because it is persuasive to those who generally favor the death penalty").

⁹ *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁰ *Roper*, 543 U.S. at 571 (referring to "the diminished culpability of juveniles"); *Atkins*, 536 U.S. at 319 ("the lesser culpability of the mentally retarded offender"). For a critique of the Court's consideration of juvenile and mentally retarded offenders' culpability, see *infra* Part I.A.

affect juvenile and mentally retarded offenders,¹¹ that these decisions also affect non-juvenile and non-mentally retarded offenders is not so obvious. This Article proposes, though, that *Roper* and *Atkins* do affect these still-included offenders, in ways that lend support to the adage about two wrongs not making a right. As substantial as the wrongs of capital punishment are, they might not excuse the wrongs of categorical exclusions from capital punishment.¹²

Part I begins with a discussion of the Supreme Court's reasoning in *Atkins* and *Roper*. The key problem in these decisions is the Court's failure to recognize categorical exclusions' implications for non-juvenile and non-mentally retarded offenders.¹³ Because not all offenders who after *Atkins* and *Roper* are ineligible for the death penalty are necessarily less culpable than those who may still be sentenced to death, the categorical exclusions allow for the unequally severe punishment of equally culpable offenders.¹⁴ These unequal sentences are unjust, and—because they are based on factors only imperfectly related to culpability—they are also arbitrary.¹⁵

Additionally, in the twenty states that prior to *Atkins* and *Roper* had included juvenile and mentally retarded offenders among those who could be sentenced to death, the Court's decisions might render the death sentences of non-juvenile and non-mentally retarded offenders more severe than those states' legislatures had intended.¹⁶ These sentences might be more severe for two reasons. First, had a legislature known when it enacted its death penalty scheme that not all offenders whom it considered potentially deserving of the death penalty could receive this sentence, it might have chosen to

¹¹ The effect of *Roper* on juvenile offenders is easy to identify—after *Roper*, the death penalty is an unconstitutional punishment for crimes committed by those who are not yet eighteen years old. Identifying the effect of *Atkins* on mentally retarded offenders is superficially as easy—after *Atkins*, the death penalty is an unconstitutional punishment for crimes committed by those who are mentally retarded. But as is discussed in detail in Part I, determining whether an offender is mentally retarded is vastly harder than determining whether he is eighteen years old. See also *infra* note 161 and accompanying text.

¹² This caution is meant to apply only to categorical exclusions that are based on imperfect correlations with culpability. See *infra* notes 21-27 and accompanying text.

¹³ See *infra* Part I.A.

¹⁴ See *infra* Part I.B.1.

¹⁵ See *infra* Part I.B.2.

¹⁶ See *infra* Part I.B.3.

enact a different scheme.¹⁷ And second, if only some offenders who deserve a punishment actually receive it, then the offenders who are punished are treated as more blameworthy than the legislature had considered them to be.¹⁸

Part II discusses the effects of *Atkins* and *Roper* in the context of the broader capital punishment system. Numerous scholars—and on occasion a few members of the Supreme Court as well—have noted the difficulty, if not impossibility, of achieving both fairness in individual capital sentences and consistency among sentences.¹⁹ To the extent that categorical exclusions prevent the death penalty from being imposed when a juvenile or a mentally retarded offender is not so culpable as to deserve this punishment, the decisions in *Atkins* and *Roper* promote both of these capital-punishment sentencing goals. But by excluding from the death penalty even those juvenile and mentally retarded offenders who are as culpable as the non-juvenile and non-mentally retarded offenders who may be sentenced to death, the decisions in *Atkins* and *Roper* allow unfairness in individual sentences and inconsistency across sentences.²⁰ Moreover, because neither decision addresses even the possibility that categorical exclusions will diminish fairness and consistency, *Atkins* and *Roper* create a false sense that the justness of capital punishment has only been enhanced. This Article concludes that although the many wrongs of capital punishment provide strong motivation for believing that the *Atkins* and *Roper* decisions are right, the rightness of these decisions becomes far from certain when the consequences for non-excluded offenders are considered. Capital punishment after *Atkins* and *Roper* might appear to be more just, but this appearance might be misleading.

I. THE MISSTEPS OF *ATKINS* AND *ROPER*

A. *From Imperfect Correlations to Categorical Exclusions*

In *Atkins* and *Roper*, the Supreme Court justified categorically excluding certain offenders from the death penalty on the basis of those offenders' diminished culpability, yet defined the categories of offenders to be excluded—juvenile

¹⁷ See *infra* notes 145-47 and accompanying text.

¹⁸ See *infra* notes 131-43 and accompanying text.

¹⁹ See *infra* Part II.

²⁰ See *infra* Part II.B.

and mentally retarded offenders—in terms of characteristics—age and mental abilities—that are only imperfectly related to culpability.²¹ A person's level of culpability for a given act is most directly a function of the mental state that accompanied the act, not of age or cognitive abilities.²² Certainly, age and

²¹ This Article assumes, without necessarily endorsing, the same culpability-based, retributivist rationale for the death penalty as has the Supreme Court. See *Spaziano v. Florida*, 468 U.S. 447, 461 (1984) (stating that retributivism is the “primary justification of the death penalty”); Richard S. Murphy, Comment, *The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303, 1333 (1988) (“[T]he Court’s approach to punishment, at least in the death penalty context, is essentially retributive despite protestations to the contrary.”); cf. Austin Sarat, *Putting a Square Peg in a Round Hole: Victims, Retribution, and George Ryan’s Clemency*, 82 N.C. L. REV. 1345, 1350 (2004) (“Modern legality is founded on an effort to make reason triumph over emotion and to make punishments proportional in their severity to the crimes that occasion them. Just deserts, not deterrence or rehabilitation, becomes the primary, if not the sole, norm governing punishment.” (footnotes omitted)).

This Article does not address either deterrence or incapacitation, the two other commonly invoked rationales for capital punishment, because whether an offender is mentally retarded or a juvenile cannot affect the legitimacy of either rationale. If incapacitation is a legitimate reason to sentence anyone to death, then it is a legitimate reason to sentence a mentally retarded or juvenile offender to death—the mentally retarded or juvenile offender will be just as incapacitated as any non-mentally retarded or non-juvenile offender. Similarly, if deterrence is a legitimate reason for sentencing a non-mentally retarded or non-juvenile offender to death, then it is a legitimate reason for sentencing a mentally retarded or juvenile offender to death. In *Atkins* and *Roper*, the Court argued that the deterability (or lack thereof) of mentally retarded and juvenile offenders supported categorically excluding them from capital punishment. *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (“As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for the petitioner acknowledged at oral argument.”); *Atkins v. Virginia*, 536 U.S. 304, 319-20 (2002) (“Exempting the mentally retarded from [capital] punishment will not affect the ‘cold calculus that precedes the decision’ of other potential murderers. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders.” (citation omitted)). But the Court’s arguments mostly miss the real point of the deterrence rationale, which is that the death penalty deters other people from committing crimes. Thus the issue is not whether mentally retarded or juvenile offenders can be deterred but whether executing them can deter other people from committing crimes. There seems to be no reason to believe that the deterrent effect (if any) of the death penalty on potential murderers is at all influenced by whether some of those who have received death sentences are mentally retarded or juvenile offenders.

²² See *Tison v. Arizona*, 481 U.S. 137, 156 (1987) (“A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.”); Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 953 (2000) (“Criminal culpability is always a function of what the actor believes regarding the nature and consequences of his conduct and what the actor’s reasons are for acting as he does in light of those beliefs.”); Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 800 (1985) (“Both the law and lay judgments individuate an actor’s culpability according to the mental states that accompany actions.”).

cognitive abilities, along with many other aspects of a person's background, might influence culpability, especially penalty-phase culpability.²³ What is difficult to determine, though, is the point at which these aspects actually, rather than merely potentially, influence culpability. While capacity for culpability undoubtedly does tend to increase with both age and cognitive ability, at least up until a certain threshold, there is no single point on either the age or cognitive ability spectrum that divides all those who are capable of a particular level of culpability from all those who are not.²⁴ Simply put, neither age nor mental ability correlates perfectly with capacity for culpability.

In *Roper*, the Court seemed to recognize on some level the imperfect relationship between age and culpability,²⁵ acknowledging at least a theoretical possibility that some juvenile offenders might act with death penalty-level

²³ See Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1562 (1998) (suggesting that in capital cases "remote" reduced culpability . . . focuses on the defendant's character. It includes such things as abuse as a child and other deprivations that may have helped shape the defendant into the kind of person for whom a capital crime was a conceivable course of action."); Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590, 2622 n.134 (1996) (proposing that sentencing-phase jurors in capital cases should be instructed "to consider not only the circumstances surrounding the crime, but also aspects of the defendant's character, background, and capabilities that bear on his culpability for the crime").

²⁴ See Donald N. Bersoff, *The Differing Conceptions of Culpability in Law and Psychology*, 11 WIDENER L. REV. 83, 91 (2004) ("IQ, after all, is not the factor that renders the imposition of the death penalty against those with mental retardation unjust. Rather, IQ is a proxy, an imperfect one at that, for a combination of factors, such as maturity, judgment, and the capability of assessing the consequences of one's conduct, that determines the relative culpability of a mentally retarded killer."); Stephen J. Morse, *Not So Hard (And Not So Special), After All: Comments On Zimring's 'The Hardest of the Hard Cases'*, 6 VA. J. SOC. POL'Y & L. 471, 484-85 (1999) ("Adolescents as a class may be more developmentally malleable or amenable to treatment than adults, but then amenability or malleability, not age, is the operative variable.").

This lack of a perfect dividing point means that some juvenile and mentally retarded offenders will fall on the sufficiently culpable end of the culpability spectrum and also that some non-juvenile and non-mentally retarded offenders will fall on the not sufficiently culpable end. This Article focuses on the first group of offenders, because those in the second group already have an independently valid claim against a death sentence (the claim that they are not sufficiently culpable). The concern in this Article is the effect that categorically excluding the first group will have on the sentences of yet a third group, those non-juvenile and non-mentally retarded offenders who also fall on the sufficiently culpable end of the culpability spectrum.

²⁵ *Roper*, 543 U.S. at 574 ("The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach.").

culpability.²⁶ In *Atkins*, though, the Court seemed to declare that for cognitive ability, a perfect dividing point does exist, such that all people who fall on the mentally retarded end of the cognitive ability spectrum are incapable of acting with a level of culpability that might warrant capital punishment.²⁷

Two problems exist with this declaration that not a single person with mental retardation can commit a capital crime with the same level of culpability as someone without mental retardation. First, it is not supported by the available mental retardation research, as a close look at the sources the Court cited in the *Atkins* decision reveals.²⁸ Additionally, by failing to acknowledge the possibility that some mentally retarded offenders might act with death penalty-level culpability, the Court makes the task of administering a capital punishment system in a way that is both fair²⁹ and consistent³⁰ seem simpler than it really is. Categorical exclusions might solve the problem of improperly sentenced mentally retarded or juvenile offenders, but they raise other problems, problems that the Court in *Roper* failed to consider and that under *Atkins*, the Court could not possibly have considered because accepting the Court's reasoning means denying that these problems even exist.

1. *Atkins v. Virginia*

In *Atkins*, the Supreme Court declared that for anyone who satisfies one of several commonly accepted clinical definitions of mental retardation,³¹ a death sentence is cruel

²⁶ *Id.* at 572 (“Certainly it can be argued, although we by no means concede the point, that a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death.”).

²⁷ *Atkins v. Virginia*, 536 U.S. 304, 306 (2002) (“Those mentally retarded persons who meet the law’s requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”); *id.* at 318 (“[The] deficiencies [of mentally retarded persons] do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.”).

²⁸ See *infra* Part I.A.1.

²⁹ Fairness refers to noncomparative justice—does a particular defendant deserve, in an absolute sense, the death penalty? This concept is discussed in more detail *infra* note 127.

³⁰ Consistency means that similarly culpable offenders receive similarly severe sentences. See sources cited *infra* note 127.

³¹ It is curious that the Court adopted a clinical approach to defining the concept of mental retardation, given that it has chosen not to define similar concepts,

and unusual punishment.³² The Court based its decision on two conclusions: that a national consensus exists against sentencing mentally retarded offenders to death,³³ and that people who are mentally retarded all possess certain psychological characteristics that render them incapable of acting with the same level of culpability as people who are not mentally retarded.³⁴

A discussion of whether the Court correctly assessed the national attitude regarding the death penalty for people who are mentally retarded is beyond this Article's scope.³⁵ But even

such as insanity and competence to stand trial, in clinical, mental illness terms. See GERALD C. DAVISON & JOHN M. NEALE, *ABNORMAL PSYCHOLOGY* 536 (8th ed. 2001) ("Insanity is a legal concept, not a psychiatric or psychological concept."); Dora W. Klein, Note, *Trial Rights and Psychotropic Drugs: The Case Against Administering Involuntary Medications to a Defendant During Trial*, 55 VAND. L. REV. 165, 167 n.8 (2002) ("Incompetence to stand trial is not synonymous with mental illness; a person can be mentally ill, yet still competent to stand trial." (citing *Lee v. Alabama*, 406 F.2d 466, 471-72 (5th Cir. 1968))); see also *Lee*, 406 F.2d at 471-72 ("One may be suffering from a mental disease . . . and simultaneously have a rational and factual understanding of court proceedings and be able to consult with a lawyer on a reasonably rational basis." (citations omitted)).

³² *Atkins*, 536 U.S. at 321 (concluding that execution of offenders who are mentally retarded is excessive).

³³ *Id.* at 314 (discussing state legislatures).

³⁴ *Id.* at 319-20 (discussing Court's agreement with the legislative consensus because of the "deficiencies" of people who are mentally retarded).

³⁵ In *Atkins* as well as *Roper*, dissenting opinions argued that this consensus was not so much a reality as a product of the Court's clever counting. See *id.* at 342 ("The Court . . . miraculously extracts a 'national consensus' forbidding execution of the mentally retarded from the fact that 18 States—less than *half* (47%) of the 38 States that permit capital punishment (for whom the issue exists)—have very recently enacted legislation barring execution of the mentally retarded.") (Scalia, J., dissenting). By *Roper*, Justice Scalia was apoplectic over the counting issue:

Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of *course* they don't like it, but that sheds no light whatever on the point at issue. That 12 States favor *no* executions says something about consensus against the death penalty, but nothing—absolutely nothing—about consensus that offenders under 18 deserve special immunity from such a penalty. . . . The attempt by the Court to turn its remarkable minority consensus into a faux majority by counting Amishmen is an act of nomological desperation.

Roper v. Simmons, 543 U.S. 551, 610-11 (2005) (Scalia, J., dissenting).

But granting that some number of states prohibited the execution of juvenile and mentally retarded offenders, and also that even in states that did not expressly prohibit them such executions were uncommon, the question remains what kind of national consensus this evidence might establish. Thus, even if the Court was correct that some kind of national consensus existed regarding the execution of juvenile and mentally retarded offenders, it is nonetheless still possible that the Court erred in concluding that a national consensus existed that juvenile and mentally retarded offenders are necessarily incapable of acting with the kind of culpability that would

assuming that the Court's assessment of a national consensus against such punishment was correct, the *Atkins* decision is still troubling because of the Court's assertions about the relationship between a diagnosis of mental retardation and the capacity for culpability.³⁶

a. Mental Retardation "By Definition"

In explaining its decision to exclude all people with mental retardation from the death penalty, the *Atkins* Court asserted that "by definition [mentally retarded persons] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."³⁷ A diagnosis of mental retardation does not, however, "by definition" necessarily include impairments in the particular skills the Court listed. Currently, the two most commonly used definitions of mental retardation are the definition adopted by the American Psychiatric Association³⁸ and the definition adopted by the American Association of Mental Retardation.³⁹

justify the death penalty. See *Leading Cases*, 116 HARV. L. REV. 200, 226-27 n.65 (2002) (noting that in *Atkins* "the Court [did not] cite any legislative history supporting its view that the reduced culpability justification was the moral impetus for the state bans").

³⁶ Cf. Mario J. Rizzo & Douglas Glen Whitman, *The Camel's Nose Is in the Tent: Rules, Theories, and Slippery Slopes*, 51 UCLA L. REV. 539, 579-80 n.107 (2003) (observing that "the underlying theory about why mental retardation is relevant in a criminal context is . . . vague").

³⁷ *Atkins*, 536 U.S. at 318.

³⁸ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 49 (4th ed. text revision 2000) [hereinafter DSM-IV-TR]. Under the APA definition,

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

Atkins, 536 U.S. at 308 n.3.

³⁹ AM. ASS'N OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (10th ed. 2002) [hereinafter AAMR DEFINITION 2002]. Under the AAMR definition, mental retardation "is a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." *Id.* The current AAMR definition differs somewhat from the AAMR definition that was in effect when the Supreme Court decided *Atkins*. Under that definition, mental retardation "is characterized by

Although these two definitions differ slightly, both regard mental retardation as a syndrome characterized by three kinds of symptoms: subaverage intellectual functioning, limitations in some number of adaptive skills, and onset before adulthood.⁴⁰ A person diagnosed with mental retardation might—but also might not—suffer from one or more of the specific “diminished capacities” on the Court’s list. The only feature, though, that people with mental retardation necessarily have in common is that an examiner has concluded that each meets the criteria of some definition of mental retardation. Contrary to the *Atkins* Court’s repeated references to “their impairments”⁴¹ and “their deficiencies,”⁴² people who have been diagnosed with mental retardation do not uniformly exhibit any particular behavioral characteristics

significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.” *Atkins*, 536 U.S. at 308 n.3.

⁴⁰ As the Court summarized, “clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.” *Id.* at 318.

The Court seemed oddly untroubled about—or perhaps just unaware of—the instability of these definitions. But clinical definitions of mental retardation change rather often. In 2002, following *Atkins*, the AAMR revised its diagnostic criteria, emphasizing consideration of deficits in adaptive behaviors. Some changes have been more dramatic—in 1973, for example, the AAMR changed the definition of subaverage intelligence from an IQ score one standard deviation below the mean (85) to an IQ score two standard deviations below the mean (70). See Sharon Landesman & Craig Ramey, *Developmental Psychology and Mental Retardation: Integrating Scientific Principles with Treatment Practices*, 44 AM. PSYCHOL. 409, 409 (1989) (“What is well accepted within the field of mental retardation, but often viewed as surprising to those outside it, is that mental retardation is an arbitrarily defined diagnostic category, which has changed frequently and substantively over the years.”). Moreover, definitions of mental retardation change not because of new scientific discoveries but because of new political values:

The process of defining mental retardation is essentially an exercise in public policy. There is no single God-given definition that scientists can discover and present as the “true” definition. . . . Prior to the new AAMR definition, scientists had already produced eight different AAMR definitions of mental retardation. . . . Each of the prior eight definitions had significant implications for people in terms of service models, stigmatization, and segregation. The task of developing the ninth AAMR definition was essentially one of selecting from a range of possibilities the language and concepts that might serve as the cornerstone of today’s public policy.

Steven Reiss, *Issues in Defining Mental Retardation*, 99 AM. J. MENTAL RETARDATION 1, 5 (1994) (discussing the next-to-the-most-recent change in the AAMR’s definition of mental retardation).

⁴¹ *Atkins*, 536 U.S. at 306, 318, 320.

⁴² *Id.* at 305, 318.

or personality traits. As the American Psychiatric Association stresses in its diagnostic manual, “No specific personality and behavioral features are uniquely associated with Mental Retardation. Some individuals with Mental Retardation are passive, placid and dependent, whereas others can be aggressive and impulsive.”⁴³

b. The Atkins Court’s Sources

The Court provides citations for two of its statements proposing that people diagnosed with mental retardation necessarily possess certain psychological traits. In the first of these, the Court stated: “[B]y definition [mentally retarded persons] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”⁴⁴ The Court then cited two sources to support this statement: a book chapter discussing the evaluation of mentally retarded criminal defendants⁴⁵ and an article summarizing the difficulties faced by mentally retarded criminal defendants.⁴⁶

The book chapter covers a wide range of topics, from “understanding mental retardation” to “the role of families,

⁴³ DSM-IV-TR, *supra* note 38, at 44. Steven Reiss, a professor of psychology and psychiatry at Ohio State University, similarly writes:

Over the years, scientists have proposed various maladaptive traits to be characteristic of mental retardation. These include cognitive rigidity, neuroticism, excessive attention seeking, and disassociation between verbal and motor systems. Generally, researchers have failed to confirm theories holding that a specific trait is characteristic of all or most people with mental retardation. Instead, researchers have found vast individual differences in behavior among persons with mental retardation.

Steven Reiss, *A Mindful Approach to Mental Retardation*, 56 J. SOC. ISSUES 65, 73 (2000) (citations omitted); *see also* Alfred A. Baumeister, *Mental Retardation: Some Conceptions and Dilemmas*, 42 AM. PSYCHOL. 796, 797 (1987) (“[M]entally retarded subjects grouped homogeneously with respect to IQ exhibit significantly more between-individual differences on various tasks than do similarly grouped nonretarded subjects. To add more complexity, retarded individuals typically show greater within-subject variability than nonhandicapped individuals.”).

⁴⁴ *Atkins*, 536 U.S. at 318.

⁴⁵ *Id.* at 318 n.23 (citing John J. McGee & Frank J. Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System*, in THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION 55, 58-60 (R. Conley, R. Luckasson & G. Bouthilet eds., 1992)).

⁴⁶ *Id.* (citing Kenneth L. Appelbaum & Paul S. Appelbaum, *Criminal-Justice Related Competencies in Defendants with Mental Retardation*, 22 J. PSYCHIATRY & L. 483, 487-89 (1994)).

guardians, and advocates.”⁴⁷ The specific pages the Court referenced discuss three topics, each in a single paragraph: “cognition and decision making,” “cognition and social understanding,” and “cognition and moral reasoning.”⁴⁸ Given the brief treatment of these topics, the superficiality of the discussion is not surprising. For example, the authors state that “[i]ndividuals with mental retardation have rigid thought processes that lead to a difficulty or failure to learn from mistakes, resulting in counterproductive behaviors.”⁴⁹ This statement, which is not supported by any citations, is followed by speculation—again unsupported—that “[p]ossible reasons for this rigidity and persistence center on a limited repertoire of social and communication skills.”⁵⁰ At best, this source helps establish that mentally retarded defendants as a group tend to exhibit certain traits, such as limited communication skills or difficulty learning from mistakes. While the chapter’s authors likely approve of the *Atkins* decision,⁵¹ the chapter itself fails to support the *Atkins* Court’s contention that “by definition” all people diagnosed with mental retardation possess these traits.

The second source, an article published in an interdisciplinary law and psychiatry journal, similarly presents a general overview of the characteristics of people diagnosed with mental retardation.⁵² As a whole, the cited paper might serve as a useful introduction to or review of the varying competencies of people diagnosed with mental retardation, but it does not provide a basis for concluding that certain psychological traits of people who are mentally retarded are uniformly and universally different from the traits of people who are not mentally retarded. The particular pages the

⁴⁷ John J. McGee & Frank J. Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System*, in *THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION* 55, 58-60 (R. Conley, R. Luckasson, & G. Bouthilet eds., 1992).

⁴⁸ *Id.*

⁴⁹ *Id.* at 58.

⁵⁰ *Id.*

⁵¹ The chapter presents, for example, under a section headed “Recommendations,” in which the authors present what they describe as the “research and programmatic support systems [that] need to be initiated and established within the social fabric of the United States if justice is to be granted to persons with mental retardation,” the item, “Abolition of the death penalty as a politically symbolic act congruent with basic human rights and the highest expression of a culture of life.” McGee & Menolascino, *supra* note 47, at 71-72.

⁵² See Kenneth L. Appelbaum & Paul S. Appelbaum, *Criminal-Justice-Related Competencies in Defendants with Mental Retardation*, 14 J. PSYCHIATRY & L. 483, 487-89 (1994).

Atkins Court cited do include such statements as “Many persons with mental retardation have communication problems,”⁵³ and “Some persons with mental retardation exhibit an increased tendency toward passivity or helplessness.”⁵⁴ These statements’ qualifiers—“many,” “some”—implicitly contradict the Supreme Court’s contention that all people with mental retardation possess certain psychological or behavioral traits. And while these statements are supported by citations, the sources that are cited present results that possess only limited generalizability.⁵⁵ For example, the statement “Among people with mental retardation, appropriate responsiveness decreases as the complexity of the question increases,”⁵⁶ is supported with a citation to a single study, which examined the extent to which subjects responded appropriately (defined as providing relevant but not necessarily truthful answers) to different kinds of questions (yes-no, multiple choice, and open-ended) posed by an examiner.⁵⁷ This study found that “[r]etarded persons achieve moderate success in answering either-or questions” and “have their greatest difficulty with open-ended questions and with verbal multiple choice questions.”⁵⁸ These results do support the study’s conclusion that framing questions in a certain way is likely to increase a mentally retarded person’s responsiveness in an interview setting.⁵⁹ The results do not, however, support the *Atkins* Court’s contentions that people diagnosed with mental retardation necessarily have a diminished ability to communicate. Indeed, even though in this study open-ended and verbal multiple choice questions produced the lowest mean percentage of appropriate responses, as compared to the other kinds of questions, mentally retarded adults responded appropriately to these kinds of questions more than fifty percent of the time.⁶⁰ Moreover, all of the

⁵³ *Id.* at 487.

⁵⁴ *Id.* at 489.

⁵⁵ This statement is not meant as a criticism of the paper or of the sources it cited, only of the *Atkins* Court’s use of the paper to support statements that are more general than warranted.

⁵⁶ Appelbaum & Appelbaum, *supra* note 52, at 487.

⁵⁷ Carol K. Sigelman, Jane L. Winer & Carol J. Shoenrock, *The Responsiveness of Mentally Retarded Persons to Questions*, 17 EDUC. & TRAINING MENTALLY RETARDED 120, 120-24 (1982), cited in Appelbaum & Appelbaum, *supra* note 52, at 499 n.30.

⁵⁸ Sigelman, Winer & Shoenrock, *supra* note 57, at 123

⁵⁹ *Id.* at 124.

⁶⁰ *Id.* at 123.

study's adult subjects were institutionalized and many were diagnosed with moderate or severe mental retardation,⁶¹ suggesting that they were, as a group, far more impaired than anyone who is at all likely to be convicted of a capital crime.⁶²

The *Atkins* Court, in the second sentence devoted to supporting its position that certain psychological characteristics of people who are mentally retarded render them incapable of acting with death penalty-level culpability, stated: "[T]here is abundant evidence that [mentally retarded persons] often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders."⁶³ In support of this statement, the Court cited four sources: a law review article⁶⁴ and three articles from social science journals discussing three particular psychological characteristics—ego identity, self regulation, and competency to confess.⁶⁵

The law review article presents a thoughtful discussion of the difficulties that certain aspects of the criminal law often pose for defendants who are mentally retarded, especially as distinguished from the particular difficulties that defendants who are mentally ill often experience.⁶⁶ The article also includes some general, although carefully qualified, statements

⁶¹ *Id.* at 121 (describing adult sample as consisting of "42 institutionalized adults in the severe to mild ranges of retardation"). The sample subjects' mean IQ was 39.76 with a standard deviation of 13.12. *Id.* An IQ level of 35-40 defines the boundary between moderate and severe mental retardation. See DSM-IV-TR, *supra* note 38, at 49.

⁶² Simply as a matter of statistics, most offenders are likely to be diagnosed with mild mental retardation, the level that "constitutes the largest segment (about 85%) of those with the disorder." DSM-IV-TR, *supra* note 38, at 43. Moderate mental retardation "constitutes about 10% of the entire population of people with Mental Retardation," while "[t]he group with Severe Mental Retardation constitutes 3%-4% of individuals with Mental Retardation." *Id.* Additionally, all defendants with severe mental retardation and most with moderate mental retardation will likely be found incompetent to stand trial. See *Dusky v. United States*, 362 U.S. 402, 402 (1960) (ruling that to be competent to stand trial, a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and must have "a rational as well as factual understanding of the proceedings against him").

⁶³ *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

⁶⁴ James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 429 (1985).

⁶⁵ Caroline Everington & Solomon M. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 MENTAL RETARDATION 212, 212-13 (1999); Rachel Levy-Shiff, Peri Kedem & Zamira Sevilla, *Ego Identity in Mentally Retarded Adolescents*, 94 AM. J. MENTAL RETARDATION 541, 546-47 (1990); Thomas L. Whitman, *Self-Regulation and Mental Retardation*, 94 AM. J. MENTAL RETARDATION 347, 360 (1990).

⁶⁶ Ellis & Luckasson, *supra* note 64.

about character traits that people who are mentally retarded often exhibit, statements such as “People with mental retardation are often described as impulsive or as having poor impulse control,” and “Studies on the moral development of people with mental retardation reveal that some individuals have incomplete or immature concepts of blameworthiness and causation.”⁶⁷ Nowhere in this article, however, is there any statement asserting that all mentally retarded people possess any particular traits.

The three social science articles similarly fail to support the contention that certain psychological characteristics are universally observed in people who are mentally retarded. The paper on self-regulation reviews the literature on this trait for the purpose of proposing a comprehensive program to improve self-regulation among people with mental retardation.⁶⁸ Although the page that the *Atkins* Court cited does include such broad statements as “In summary, individuals with mental retardation have great difficulty regulating their own behavior,”⁶⁹ the article earlier cautioned that “considerable research is needed to delineate the structure of the self-regulation system among nonretarded and retarded persons.”⁷⁰

The study of ego identity found that among mentally retarded adolescents, as compared to non-mentally retarded adolescents and preadolescents, “[d]iffused identity was particularly evident in three areas: feelings of meaningfulness, physical self, and mastery,”⁷¹ while the study of competence to confess found that “significantly more persons with mental retardation than without mental retardation” both “did not meet minimum criteria for competence [to confess]” and “did not understand any of the substantive portions of the [*Miranda*] warning.”⁷² If in these studies all mentally retarded subjects demonstrated weaker ego identity or diminished competence to confess, such a result is not obvious from the published reports.⁷³

⁶⁷ *Id.* at 429. These statements are preceded by the statement that “[m]entally retarded people are individuals. Any attempt to describe them as a group risks false stereotyping and therefore demands the greatest caution.” *Id.* at 427.

⁶⁸ Whitman, *supra* note 65.

⁶⁹ *Id.* at 360.

⁷⁰ *Id.* at 355.

⁷¹ Levy-Shiff, Kedem & Sevilla, *supra* note 65, at 545.

⁷² Everington & Fulero, *supra* note 65, at 216.

⁷³ For example, while the study of ego identity reported significant differences between mentally retarded adolescents and the two comparison groups

In sum, all three social science sources as well as the law review article are consistent with the *Atkins* Court's statement that people who are mentally retarded "often" act impulsively and at the direction of others.⁷⁴ In this particular statement, though, the Court itself modifies its absolutist position that mentally retarded offenders "by definition" possess certain traits that make them less culpable than offenders who are not mentally retarded.⁷⁵

2. *Roper v. Simmons*

As in *Atkins*, the Court in *Roper* explained its decision to adopt a categorical exclusion from eligibility for the death penalty—this time, for offenders who committed their crimes when they were not yet eighteen years old—as justified by two findings: that a national consensus exists against the death penalty for juveniles,⁷⁶ and that juvenile offenders are less culpable for their actions than non-juvenile offenders.⁷⁷ Compared to the *Atkins* decision, with its assertions that mentally retarded offenders "by definition" possess certain personality traits that render them incapable of death penalty-level culpability, the Court in *Roper* is somewhat better about qualifying its statements regarding juvenile offenders' character traits. For example, the Court stated that immaturity and irresponsibility are traits "found in youth more often than in adults."⁷⁸ The statements most clearly implying a recognition that not all people under the age of eighteen are

(non-mentally retarded adolescents and preadolescents) on three measures of ego identity, significant differences were not observed on three other measures (commitment and purpose, social recognition, and genuineness). Levy-Shiff, Kedem & Sevilla, *supra* note 65, at 546.

⁷⁴ *Atkins*, 536 U.S. at 318.

⁷⁵ For another discussion of the lack of fit between scientific research and the Court's reasoning in *Atkins*, see Christopher L. Chauvin, *Atkins v. Virginia: How Flawed Conclusions Convert Good Intentions Into Bad Law*, 65 LA. L. REV. 473 (2004). The author, a law student at Louisiana State University, interviewed a clinical psychologist whose textbook was cited by the petitioners and who "suggests that it is 'patently false' that either any of his, [or any of the widely respected scientific research, can lead one to conclude that a diagnosis of mental retardation necessitates a conclusion that the offenders[] is less culpable for his acts." *Id.* at 500-01 (citing interviews with Johnny L. Matson, Ph.D., Director of Clinical Training in Psychology, Louisiana State University, in Baton Rouge, LA (Sept. 2002-Nov. 2002)).

⁷⁶ *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

⁷⁷ *Id.* at 571 ("Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults.").

⁷⁸ *Id.* at 569.

necessarily less culpable for their actions than people who are eighteen years old⁷⁹ are found near the end of the opinion, where the Court resorted to the assertion that “a line must be drawn somewhere” to explain why it was adopting a categorical exclusion from capital punishment for sixteen- and seventeen-year-old offenders but not for eighteen- or nineteen-year-old offenders.⁸⁰

Despite its apparent recognition that the correlation between age and culpability is less than perfect, the *Roper* Court did not acknowledge that categorically excluding juveniles from the death penalty might result in equally culpable offenders receiving unequally severe sentences. Thus, even though the *Roper* opinion’s reasoning is an improvement over the reasoning in *Atkins*,⁸¹ both decisions fail to consider even the possibility that categorical exclusions will impact not only those offenders who are excluded from the death penalty but also those offenders who remain subject to this punishment.

⁷⁹ The Court is not, however, consistent in maintaining this insight. *E.g., id.* at 571 (referring to “the diminished culpability of juveniles” and the “characteristics that render juveniles less culpable than adults”).

⁸⁰ *Id.* at 574. The Court offers an unsatisfactory explanation of why line-drawing is necessary. *Id.* (“The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.”). Criminal sentencing—particularly death penalty sentencing—is supposed to be the ultimate in individualized assessment. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (“Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.”). That governments draw lines for voting and marrying and other mass activities is not at all relevant to the question whether categorical rules should apply to eligibility for capital punishment.

⁸¹ The *Roper* Court’s sources, however, are perhaps no better than those in *Atkins*. See Deborah W. Denno, *The Scientific Shortcomings of Roper v. Simmons*, 3 OHIO ST. J. CRIM. L. 379, 380 (2006) (“For such a deep and important opinion, *Roper* is far too scanty, vague, and dated in explaining how and why modern science justifies the legal distinction between juveniles and adults.”). The difference in citation problems between *Atkins* and *Roper* is that while the *Roper* Court could have found better sources to support its claims that as a group juveniles are more likely than adults to possess certain character traits that influence culpability, sources simply do not exist that would support the *Atkins* Court’s claims about the necessarily diminished culpability of people who are mentally retarded.

B. From Categorical Exclusions to Problematic Punishments

1. Unjust Punishments: Treating Like Cases Unlike

The old Aristotelian principle still holds true: like cases are to be treated alike, and unlike cases unlike.⁸²

By excluding some offenders from the death penalty on the basis of criteria that are only imperfectly correlated with culpability, the categorical rules adopted in *Atkins* and *Roper* allow equally culpable offenders to receive unequally severe sentences. For example, a person who breaks into a woman's house, wraps her face in duct tape and binds her hands and feet with electrical cord, then tosses her off a bridge to drown⁸³ might receive a death sentence if he commits this crime a week after his eighteenth birthday, while a person who commits this same crime a week before his eighteenth birthday cannot receive the same sentence.⁸⁴ Nothing the *Roper* Court said—or could have said—about juveniles, however, supports a conclusion that the not-quite eighteen-year-old cannot have acted with the same level of culpability as the just-barely eighteen-year-old.⁸⁵ Thus, the just-barely eighteen-year-old

⁸² Margareth Etienne, *Parity, Disparity, and Adversariality: First Principles of Sentencing*, 58 STAN. L. REV. 309, 311 (2005). More recently, Congress enacted the Federal Sentencing Guidelines to achieve equality in sentencing. See *id.* at 315 (“It has been said that the principal goal of the Federal Sentencing Guidelines has been ‘to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice.’” (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996))); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 825 n.234 (2006) (“The chief justification for the Guidelines was the elimination of unjustified sentencing disparity.”). Although the Supreme Court recently declared unconstitutional on Sixth Amendment grounds the statutory provision making the Guidelines mandatory, the Court also preserved an advisory role for the Guidelines. *United States v. Booker*, 543 U.S. 220, 245-46 (2005) (ruling that as modified by the Court’s decision, the Federal Sentencing Act “makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well.” (internal citations omitted)).

⁸³ These are the undisputed although abbreviated facts of *Roper v. Simmons*, 543 U.S. 551, 556-57 (2005).

⁸⁴ For a similar example, see generally Joseph L. Hoffmann, *On the Perils of Line Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229 (1989).

⁸⁵ David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1584 (2004) (“[A]ge is an imperfect proxy for maturity. Even if maturation is reasonably regular, so that there is a significant correlation between age and maturity, there will be individual variance. Some 16-year-olds will have as much normative competence as the normal 18-year-old, and some 16-year-olds will have as much normative competence as the normal 14-year-old.” (footnote omitted)). According to Judge Posner,

who does receive a death sentence for this crime has a valid argument that so long as his actions were no more harmful and his mental state no more culpable, he should not be punished more severely than the not-quite eighteen-year-old.⁸⁶

The just-barely non-mentally retarded⁸⁷ offender has the same argument. For example, a person who abducts a man at gunpoint from a convenience store parking lot, forces him to drive to an ATM machine and withdraw money, then shoots him eight times⁸⁸ might receive a death sentence for committing this murder if his score on an IQ test is 78 (generally outside the range of a mental retardation diagnosis) while a person who scores 74 on an IQ test and is found to be mentally retarded cannot receive the same sentence.⁸⁹

The Justices in the [*Roper*] majority should not have relied on a psychological literature that they mistakenly believed showed that persons under eighteen are incapable of mature moral reflection. One does not have to be a social scientist to know that such an inference cannot be correct. Chronological age does not coincide with mental or emotional maturity; age eighteen is not an inflection point at which teenagers suddenly acquire an adult capacity for moral behavior. The studies on which the Court relied acknowledge that their findings that sixteen- or seventeen-year-olds are less likely to make mature judgments than eighteen-year-olds are statistical rather than individual and do not support a categorical exclusion of sixteen- and seventeen-year-olds from the ranks of the mature.

Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 64-65 (2005).

⁸⁶ STEPHEN NATHANSON, AN EYE FOR AN EYE?: THE IMMORALITY OF PUNISHING BY DEATH 62 (2d ed. 2001) (“If death is arbitrarily imposed on only some who deserve it, while others equally deserving are treated more leniently, then those who are executed are treated unjustly, even if they deserved to die.”); see also Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 121 (noting though not necessarily endorsing the position “that even defendants who have committed aggravated capital crimes may properly claim injustice if they are given death sentences when others of equal or greater culpability receive prison terms”).

⁸⁷ There is a diagnostic category for people who are not quite mentally retarded: Borderline Intellectual Functioning. DSM-IV-TR, *supra* note 38, at 740. (“This category can be used when the focus of clinical attention is associated with borderline intellectual functioning; that is, an IQ in the 71-84 range.”).

⁸⁸ These facts are simplified from *Atkins*, in which the defendant admitted participating in the abduction and armed robbery but claimed that someone else was the triggerman. *Atkins v. Virginia*, 536 U.S. 304, 307-08 (2002).

⁸⁹ The DSM criteria for mild mental retardation specify an IQ score in the range of 55 to “approximately 70.” DSM-IV-TR, *supra* note 38, at 49. Because of a five point margin of error for IQ tests, “it is possible to diagnose Mental Retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the criteria for Mental Retardation.” *Id.* at 48.

The Flynn effect complicates matters further. This effect refers to the increase in IQ scores over time. See Stephen J. Ceci, Matthew Scullin & Tomoe Kanaya, *The Difficulty of Basing Death Penalty Eligibility on IQ Cutoff Scores for Mental Retardation*, 13 ETHICS & BEHAV. 11, 12 (2003). Specifically, this effect means

Although age is an imperfect marker for culpability, drawing the incapable-of-death-penalty-level-culpability line at seventeen years, three hundred and sixty four days old at least has the virtues, as compared to mental retardation as a marker for culpability, of simplicity and objectivity. Like age, mental retardation is an imperfect marker for culpability, but unlike determining whether someone is or is not eighteen years old, determining whether someone is or is not mentally retarded involves a host of complex and subjective assessments.

A diagnosis of mental retardation is based on three findings: significantly subaverage intellectual functioning, almost always as measured by an IQ test;⁹⁰ significantly impaired adaptive functioning in at least one (AAMR definition) or two (APA definition) areas of daily life;⁹¹ and manifestation of these impairments before adulthood.⁹² All three criteria require judgment calls on the part of the person making the assessment.

Administering an IQ test involves literally hundreds of judgment calls. For example, the IQ test most commonly administered to adults, the Wechsler Adult Intelligence Scale-III (WAIS-III),⁹³ consists of fourteen subtests, three of which (Comprehension, Similarities, and Vocabulary) require the examiner to score open-ended responses. Thus, the examiner must decide whether to award zero, one, or two points to a response such as "For when it rains," to a question such as

that "the use of IQ norms based on a prior cohort of test-takers progressively inflates the IQ scores of subsequent cohorts of test-takers." *Id.* Expert opinions differ as to how examiners should take the Flynn effect into account in individual cases. Compare *id.* at 16 (arguing that "it is insufficient for courts to simply ask for an IQ score"), with I. Bruce Frumkin, *Challenging Expert Testimony on Intelligence and Mental Retardation*, 34 J. PSYCHIATRY & L. 51, 60 (2006) ("This is not to say that a psychologist should 'adjust' the IQ score to take into consideration the Flynn effect."), and Jianjun Zhu & David S. Tulsky, *Can IQ Gain Be Accurately Quantified by a Simple Difference Formula?*, 88 PERCEPTUAL & MOTOR SKILLS 1255, 1259-60 (1999) (suggesting that the Flynn effect should not cause examiners to adjust individual IQ scores).

⁹⁰ DSM-IV-TR, *supra* note 38, at 49.

⁹¹ "Adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." *Id.* at 42.

⁹² These three components are similar though not identical in the two most widely accepted approaches to diagnosing mental retardation; the DSM criteria and the AAMR criteria. See *supra* notes 38-40 and accompanying text.

⁹³ See ALAN S. KAUFMAN & ELIZABETH O. LICHTENBERGER, ESSENTIALS OF WAIS-III ASSESSMENT 4-5 (1999) [hereinafter KAUFMAN & LICHTENBERGER, ESSENTIALS OF WAIS-III] ("Although many new instruments for measuring intellectual functioning have been developed in the past decade, the Wechsler scales are the most frequently used.").

“What is an umbrella for?”⁹⁴ What matters is not that the examiner award an objectively or normatively “correct” number of points but rather that the examiner award the same number of points as were awarded for similar responses when the test questions were normed; otherwise, the IQ score derived from the items will be invalid.⁹⁵

Adding to the difficulty of administering the WAIS-III is that seven of the subtests are timed (Arithmetic, Picture Completion, Picture Arrangement, Object Assembly, Digit Symbol-Coding, Symbol Search, and Block Design).⁹⁶ The amount of time allotted for various tasks is measured in seconds (e.g., 120 seconds for Digit Symbol-Coding;⁹⁷ for Picture Arrangement, 30 seconds for item one, 45 seconds for item two, 60 seconds for items three and four, 90 seconds for items five and six, and 120 seconds for items seven through eleven⁹⁸). Allowing someone a few additional seconds to copy symbols or complete a puzzle might add points to his IQ score.⁹⁹ A textbook authored by two leading experts on intelligence testing stresses the importance of properly administering and scoring every item on the WAIS-III:

Standardized administration and scoring means conducting an experiment with $N=1$ every time an examiner tests someone on an intelligence test. For the results of this experiment to be meaningful, the experimenter-examiner must adhere precisely to the wording in the manual, give appropriate probes as defined in the

⁹⁴ This is a real question from the WISC-R, the revised Wechsler IQ test for children, which was discussed in detail in a court opinion (the Psychological Corporation, which publishes the Wechsler tests, does not make test items available to the general public). The court explained the official instructions for scoring responses to this question as:

Two-point responses are: “Use it to keep the rain off . . . protects you when it rains . . . put it over your head when it rains . . . so you don’t get wet when it rains.” One-point responses are: “Carry it when it rains . . . big round thing that can fold up . . . put it over your head . . . to keep off the sun . . . you hold it up (gives appropriate demonstration) . . . helps you if it starts raining . . . keeps you dry.”

Parents in Action on Special Educ. v. Hannon, 506 F. Supp. 831, 844 (N.D. Ill. 1980).

⁹⁵ See *infra* text accompanying note 100; see also GARY GROTH-MARNAT, HANDBOOK OF PSYCHOLOGICAL ASSESSMENT 139 (4th ed. 2003) (“[T]here is a certain degree of subjectivity when scoring many of the items on [the] Comprehension, Similarities, and Vocabulary [subtests of the WAIS]. Thus, a ‘hard’ scorer may develop a somewhat lower score than an ‘easy’ scorer.”).

⁹⁶ KAUFMAN & LICHTENBERGER, ESSENTIALS OF WAIS-III, *supra* note 93, at 25.

⁹⁷ *Id.* at 32.

⁹⁸ *Id.* at 45.

⁹⁹ See *infra* text accompanying note 100.

instructions, time each relevant response diligently, and score each item exactly the way comparable responses were scored during the normative procedures. . . . [I]t is vital for an examiner to follow the standardized procedures to the letter while administering the test; otherwise, the standard scores yielded for the person will be invalid and meaningless.¹⁰⁰

After all of the items on the individual subtests are administered and scored, these scores must be added, subtracted, and/or multiplied (depending on the subtest) to obtain raw scores for each subtest; the raw scores must then be converted to scaled scores; finally, the scaled scores must be converted to indexes, or IQ scores.¹⁰¹ Studies of not only graduate student trainees but also experienced Ph.D. examiners have reported scoring errors that resulted in huge variability—ten points or more—in obtained IQ scores.¹⁰²

Assessing the second diagnostic criterion, adaptive functioning, is not a simple endeavor either.¹⁰³ Inclusion of adaptive functioning as a component of a mental retardation diagnosis was intended to balance the emphasis on the

¹⁰⁰ ALAN S. KAUFMAN & ELIZABETH O. LICHTENBERGER, *ASSESSING ADOLESCENT AND ADULT INTELLIGENCE* 20 (3d ed. 2006) [hereinafter KAUFMAN & LICHTENBERGER, *ASSESSING INTELLIGENCE*]; accord Alvin Enis House & Marjorie L. Lewis, *Wechsler Adult Intelligence Scale—Revised*, in MAJOR PSYCHOLOGICAL ASSESSMENT INSTRUMENTS 326 (Charles S. Newmark ed., 1985) (“It is difficult to stress this point strongly enough—a poorly administered instrument yields useless information.”).

¹⁰¹ KAUFMAN & LICHTENBERGER, *ESSENTIALS OF WAIS-III*, *supra* note 93, at 60-61.

¹⁰² KAUFMAN & LICHTENBERGER, *ASSESSING INTELLIGENCE*, *supra* note 100, at 198-99 (citing Joseph Ryan, Aurelio Prifitera, & Linda Powers, *Scoring Reliability of the WAIS-R*, 51 J. CONSULTING & CLINICAL PSYCHOL. 149 (1983)); see also GROTH-MARNAT, *supra* note 95, at 143 (noting that “the number of administration and scoring errors on the part of trainees and experienced clinicians is far higher than [it] should be” (citations omitted)).

¹⁰³ See Linda Knauss & Joshua Kutinsky, *Into the Briar Patch: Ethical Dilemmas Facing Psychologists Following Atkins v. Virginia*, 11 WIDENER L. REV. 121, 122 (2004) (“Determinations regarding adaptive functioning are often subjective and left largely to the clinical judgment of mental health professionals.” (citing AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 39-40 (4th ed. 1994))). State courts are increasingly expressing frustration with the subjectivity of evaluating adaptive functioning. See, e.g., *State v. Burke*, No. 04AP-12342005, 2005 WL 3557641, at *8 (Ohio App. Dec. 30, 2005) (“Although experts offer insightful opinions, the adaptive behavior criteria are subjective, and experts will offer opinions on both sides of the issue.”); *Ex parte Rodriguez*, 164 S.W.3d 400, 405-06 (Tex. Crim. App. 2005) (Cochran, J., concurring) (“As experts on both sides in this case testified, there are no objectively verifiable standards by which to gauge whether a specific person does or does not suffer the kind of significant ‘adaptive deficits’ that a diagnosis of mental retardation requires.”); *Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004) (“The adaptive behavior criteria are exceedingly subjective, and undoubtedly experts will be found to offer opinions on both sides of the issue in most cases.”).

academic kinds of intelligence measured by IQ tests with a different, practical kind of intelligence.¹⁰⁴ Historically, examiners have assessed adaptive functioning on the inherently subjective bases of interviews, observations, and professional judgment.¹⁰⁵ Recently, researchers have developed a number of test instruments for quantifying adaptive functioning.¹⁰⁶ These instruments, however, can be less than ideal for assessing adult criminal defendants who might be mentally retarded. The first problem is that most of these instruments require the availability of at least one caregiver, or other reliable independent source, to provide information.¹⁰⁷ Additionally, the particular populations that were used to develop a test's norms determine the general usefulness of that test; the norms for one widely used test, the Vineland Adaptive Behavior Scales, were developed with juveniles,¹⁰⁸ while the

¹⁰⁴ See AAMR DEFINITION 2002, *supra* note 39, at 24 ("The addition of adaptive behavior limitations as a criterion for diagnosing mental retardation was intended to better reflect the social characteristics of the disability, to reduce reliance on IQ scores, and to decrease the number of 'false positives,' or individuals falsely identified as having mental retardation."); see also Stephen Greenspan, *What Is Meant by Mental Retardation?*, 11 INT'L REV. PSYCHIATRY 6, 14 (1999) (noting that the term "adaptive behaviour" was "invented by the AAMR for use in its dual criteria definition of [mental retardation]").

¹⁰⁵ Reiss, *supra* note 40, at 4, cited in Note, *Implementing Atkins*, 116 HARV. L. REV. 2565, 2575 (2003) [hereinafter *Implementing Atkins*].

¹⁰⁶ DSM-IV-TR, *supra* note 38, at 42. Two popular tests are the Vineland Adaptive Behavior Scales, which includes questions about communication, daily living skills, socialization, and motor skills, and the American Association on Mental Retardation Adaptive Behavior Scale, which includes items measuring personal self-sufficiency, community self-sufficiency, personal-social responsibility, and social adjustment. *Id.*

¹⁰⁷ This is a general problem with assessing adaptive functioning. See DSM-IV-TR, *supra* note 38, at 42 ("It is useful to gather evidence for deficits in adaptive functioning from one or more reliable independent sources (e.g., teacher evaluation and educational, developmental, and medical history)."). Some instruments require that the information come from someone other than the person being assessed. Frumkin, *supra* note 89, at 57 ("The most common mistake forensic clinicians make in these [adaptive functioning] assessments is to evaluate adaptive functioning by giving the Vineland or [Adaptive Behavior Scales] tests to the defendant rather than to a family member or individual who knows the defendant well. Such administration procedures invalidate the testing for a variety [of] reasons in addition to violating the instructions for test administration contained in the tests' manuals.").

¹⁰⁸ See Nigel Beail, *Utility of the Vineland Adaptive Behavior Scales in Diagnosis and Research with Adults Who Have Mental Retardation*, 41 MENTAL RETARDATION 286, 286 (2003) (stating that for the 1984 Vineland, "[t]he standardization of the instrument was conducted with a sample of 3,000 individuals from birth to 18 years 11 months who were selected across the United States according to demographic information from the 1980 Census"); *id.* at 287 ("The Vineland has some major psychometric deficiencies when used with adults who have mental retardation."). According to Pearson Assessments, which publishes the Vineland, a second edition of this test, with an expanded age range, was introduced in 2006. See Vineland Adaptive Behavior Scales, Second Edition (Vineland II),

norms for the AAMR's Adaptive Behavior Scales were based only on adults diagnosed with developmental disabilities.¹⁰⁹ Finally, because adaptive functioning is context-dependent,¹¹⁰ assessment can be especially difficult when a person has been living in an atypical environment such as a prison.¹¹¹

The final diagnostic criterion—that impairments in intelligence and adaptive functioning must be evident before age eighteen—also presents problems when someone is evaluated for the first time as an adult. The primary difficulty is that the examiner might be unable to determine, because of missing school records or the absence of family members, whether any present impairments began in childhood.¹¹²

Because of the layers of complexity and subjectivity involved in diagnosing mental retardation, using mental retardation as a marker for culpability creates perhaps an even greater risk of producing unequal sentences for equal

<http://ags.pearsonassessments.com/group.asp?nGroupInfoID=aVineland> (last visited Mar. 27, 2007). Whether this new version adequately resolves the old version's psychometric problems, without introducing additional problems, remains to be investigated.

¹⁰⁹ AAMR DEFINITION 2002, *supra* note 39, at 89 (noting that the Residential and Community version of the AAMR Adaptive Behavior Scales “was developed to be appropriate for individuals through 79 years of age, but norms are not available for adults with typical functioning”). The only other version of the Adaptive Behavior Scales, the School and Community version, is unsuitable for assessing adults because it “provides norms through age 21 and includes items appropriate for school settings that may not be related to adult environments.” *Id.*

¹¹⁰ *Id.* at 8 (“Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.”); DSM-IV-TR, *supra* note 38, at 42 (noting that “behaviors that would normally be considered maladaptive (e.g., dependency, passivity) may be evidence of good adaptation in the context of a particular individual's life (e.g., in some institutional settings)”).

¹¹¹ See Stanley L. Brodsky & Virginia A. Galloway, *Ethical and Professional Demands for Forensic Mental Health Professionals in the Post-Atkins Era*, 13 ETHICS & BEHAV. 3, 7 (2003) (“Our inquiries into what evaluators from institutions for the retarded would use with someone who has been in jail or prison for many years or on death row indicated that an assessment of adaptive functioning would be difficult.”); Caroline Everington & Denis W. Keyes, *Diagnosing Mental Retardation in Criminal Proceedings: The Critical Importance of Documenting Adaptive Behavior*, 8 FORENSIC EXAMINER 31, 33 (1999) (“In situations of prolonged incarcerations, neither standardized instruments nor informal questionnaires are appropriate as the individual has no opportunity to perform in most of the skill domains.”); see also Robert H. Bruininks et al., *Adaptive Behavior and Mental Retardation*, 21 J. SPECIAL EDUC. 69, 77-80 (1987) (discussing the effect of environment on adaptive behavior), cited in *Implementing Atkins*, *supra* note 105, at 2576.

¹¹² Cf. John M. Fabian, *Death Penalty Mitigation and the Role of the Forensic Psychologist*, 27 LAW & PSYCHOL. REV. 73, 114 (2003) (“Objective adaptive functioning assessment instruments may not be available in the defendant's past records and it may be difficult to assess current adaptive functioning due to inability to contact family members and friends and obtain relevant information.”).

culpability than does using age as a marker. An offender who obtains an accurate IQ score placing him just outside the range of mental retardation—while another, no less culpable offender obtains a slightly lower score, one that is within the mentally retarded range, because the examiner who administered the IQ test miscored a few items or miscalculated a few scales, for example—has a valid argument that in neither case should a mental retardation diagnosis be grounds for either allowing or not allowing the jury to impose the death penalty. Moreover, even if the second offender's lower score were accurate, and he really did meet the criteria for a diagnosis of mental retardation, the first offender—the one who really did not meet the criteria for a diagnosis of mental retardation—would still have a valid argument that although his greater mental ability makes him more likely to be more culpable, he should not be punished more severely unless he actually is more culpable.¹¹³

In sum, the categorical exclusions adopted in *Atkins* and *Roper* affect not only the juvenile and mentally retarded offenders who cannot receive a sentence of death but also the non-juvenile and non-mentally retarded offenders who remain subject to capital punishment. The decisions in *Atkins* and *Roper* leave those offenders who are not excluded from capital punishment with a valid argument that their death sentences are unjust because like cases are not being treated alike.¹¹⁴

2. Arbitrary Punishments: "Not Based on the Nature of Things"

In the Oxford English Dictionary, among the definitions of "arbitrary" is the entry "not based on the nature of things."¹¹⁵ When a death sentence is avoided (or not avoided) solely because of age or mental ability, the punishment is arbitrary;

¹¹³ See *supra* note 86.

¹¹⁴ Of course, perfect equality in sentencing is not attainable, nor is it constitutionally required. See *Pulley v. Harris*, 465 U.S. 37, 54 (1984) ("Any capital sentencing scheme may occasionally produce aberrational outcomes."). However, the kind of inequality invited by *Atkins* and *Roper* should not be tolerated. It is one thing to accept that aberrations might occasionally occur; it is quite another thing to adopt a sentencing scheme that systematically excludes from capital punishment offenders who are not necessarily any less culpable than those who remain subject to this penalty. See Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1794 (1987) ("The absence of perfection may mean an occasional lapse from the norm or it may mean routine, gross disregard for it."); see also *supra* notes 149-56 and accompanying text (discussing sources of sentencing inequality).

¹¹⁵ 1 THE OXFORD ENGLISH DICTIONARY 602 (2d ed. 1989) (definition 3).

that is, the punishment is not based on the nature of the particular things—act and culpability for the act¹¹⁶—on which punishment ought to be based.¹¹⁷

The arbitrary imposition of death sentences once caused the Supreme Court to declare capital punishment unconstitutional. In 1972, in *Furman v. Georgia*, the Court ruled that Georgia's death penalty sentencing scheme, which allowed juries unbounded discretion in deciding whether to sentence an offender convicted of a capital crime to death, produced sentencing patterns that were so arbitrary as to violate the Eighth Amendment's ban on cruel and unusual punishments.¹¹⁸ Although five justices agreed that the sentencing scheme was unconstitutional, the justices could not come together to express their reasons in a single opinion; instead, each justice wrote only for himself. The one thread that connects the five opinions is their consensus regarding the unacceptable arbitrariness of Georgia's death penalty.¹¹⁹

¹¹⁶ See *supra* note 23 and accompanying text.

¹¹⁷ As explained *supra* note 21, this Article does not discuss other factors that might legitimately influence punishment, particularly deterrence and incapacitation, because they are not relevant to the desirability of categorically excluding juvenile and mentally retarded offenders from capital punishment.

¹¹⁸ 408 U.S. 238 (1972) (per curiam).

¹¹⁹ The Court's opinion was issued per curiam with each of the concurring (as well as dissenting) justices writing separately to explain his position, which has caused some difficulty identifying the central reasoning of *Furman*. Most commentators agree, however, that arbitrariness was the key defect in the statutes that *Furman* held unconstitutional. See, e.g., Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 914 (1982) ("Although nine separate opinions accompanied the [*Furman*] Court's per curiam decision, it is fair to say that the case stands for the proposition that capital punishment, as then administered, was inflicted arbitrarily or 'freakishly,' as one of the Justices put it, and was therefore cruel and unusual." (footnote omitted)); Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 592 (2005) ("All five of the Justices supporting the decision expressed concerns about arbitrariness, pointing to the absence of safeguards or procedures that would ensure the fair selection of the condemned."); see also Gregg v. Georgia, 428 U.S. 153, 206 (1976) (plurality opinion) ("The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty.").

Because in 1972 almost all death penalty statutes allowed this kind of discretion, the *Furman* decision effectively shut down capital punishment nationwide. Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590, 2592 n.12 (1996) ("Of the 40 state statutes in effect at the time of *Furman*, all but Rhode Island's suffered from the defect of 'standardless' discretion and were thus unenforceable in light of the decision."). Many commentators expected the ruling to mark the beginning of the end of capital punishment in this country. *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 149, 149 (1987) ("The Supreme Court's decision in *Furman* led many observers to believe that the death penalty in America was effectively nullified." (citing Franklin E. Zimring & Gordon Hawkins, *Capital Punishment and the Eighth Amendment: Furman and Gregg in*

Perhaps the clearest expression of the justices' belief that equally culpable offenders must receive equally severe sentences is Justice Stewart's statement that "of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."¹²⁰ The justices did not question whether those who had been sentenced to death deserved this punishment; instead, they questioned why these offenders had been sentenced to death while others who equally deserved this punishment had not. The justices could find no good reason. Justice Marshall observed that "the burden of capital punishment falls upon the poor, the ignorant, and the under privileged members of society," while "the wealthier, better-represented, just-as-guilty person can escape" this punishment.¹²¹ Several justices suggested that there simply was no reason why some offenders received death sentences while other, no less culpable offenders did not; death sentences were a matter of pure chance or bad luck. Justice Stewart, for example, wrote that the death penalty was cruel and unusual "in the same way that being struck by lightning is cruel and unusual."¹²² Similarly, Justice Brennan declared: "When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system."¹²³

Justice Brennan considered the possibility that rather than suggesting arbitrariness, the small number of death sentences suggested that juries were imposing this penalty only in the most deserving cases. The problem with this possibility, according to Justice Brennan, was that "[n]o one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison."¹²⁴

Retrospect, 18 U.C. DAVIS L. REV. 927, 944 (1985))). Just four years later, though, the Court upheld statutes that allowed juries to impose death sentences under certain enumerated "aggravating" circumstances, such as when a murder was committed for the purpose of obtaining money or avoiding arrest. *Gregg*, 428 U.S. at 158-207 (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion).

¹²⁰ *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring) (footnote omitted).

¹²¹ *Id.* at 365-66 (Marshall, J., concurring).

¹²² *Id.* at 309 (Stewart, J., concurring).

¹²³ *Id.* at 293 (Brennan, J., concurring).

¹²⁴ *Id.* at 294.

Justice White similarly observed that the death penalty as imposed in Georgia lacked a “meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”¹²⁵ Without such a rational, meaningful basis, the death penalty was, as Justice Douglas wrote, “not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.”¹²⁶

The moral of *Furman* is that noncomparative justice is not enough.¹²⁷ Even if those who are sentenced to death deserve this punishment, their sentences are arbitrary unless some meaningful difference exists between them and other defendants who do not receive this punishment.¹²⁸ If age and mental ability were perfect correlates of culpability, then such a meaningful difference would exist between, for example, the offender who is one week away from his eighteenth birthday

¹²⁵ *Id.* at 313 (White, J., concurring).

¹²⁶ *Furman*, 408 U.S. at 257 (Douglas, J., concurring).

¹²⁷ Noncomparative justice is concerned with whether and to what extent a person deserves to be punished, independent of whether and to what extent other people are punished. Thus we can agree with Justice Stewart that even a single day in prison for the “crime” of having a cold would be unjust, regardless of how many other people received this same punishment for the same “offense.” *Robinson v. California*, 370 U.S. 660, 667 (1962) (“Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”). If, however, some amount of time in prison could be a just sentence for having a cold, then it would matter whether other people with colds were punished, and what punishments they were given. A day’s imprisonment might be an appropriate sentence when considered in isolation, but if other offenders were receiving several months in prison—or receiving no prison time at all—then the sentences would be unjust in a comparative sense.

The terms “comparative” and “noncomparative” justice are commonly attributed to Joel Feinberg. *E.g.*, JOEL FEINBERG, *SOCIAL PHILOSOPHY* 98-99 (1973); Joel Feinberg, *Noncomparative Justice*, 83 *PHIL. REV.* 297 (1974). Other writers have used different terms to refer to the same concepts. *E.g.*, R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 133 (2001) (using the terms “absolute proportionality” and “relative proportionality”); ANDREW VON HIRSCH, *PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS* 38-46 (1985) (applying terms of “cardinal” proportionality and “ordinal” proportionality to sentencing); Thomas Hurka, *Desert: Individualistic and Holistic*, in *DESERT AND JUSTICE* 45, 45-48 (Serena Olsaretti ed., 2003) (using the terms “individualistic” and “holistic”), cited in Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 *VA. L. REV.* 677, 710 n.156 (2005).

¹²⁸ Stephen P. Garvey, *Is It Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 *N.C. L. REV.* 1319, 1330 (2004) (“Retributive justice requires an offender to be punished because and to the extent, but only to the extent, he deserves to be punished. Moreover, as a perfect obligation, retributive justice is subject to the demands of equality. Like cases must be treated alike.”); Andrew von Hirsch, *Hybrid Principles in Allocating Sanctions: A Response to Professor Robinson*, 82 *NW. U. L. REV.* 64, 65 (1987) (“In sentencing, the most important desert requirement is that of ordinal proportionality. Acts of comparable seriousness should receive punishments of approximately equal severity.”).

and the offender who is one week past his, or between the offender with an IQ score of 78 and the offender whose score is 74. But because such perfect correlations do not exist, neither age nor mental ability alone meaningfully distinguishes offenders who deserve the death penalty from those who do not.¹²⁹ As a result, it is arbitrary to allow a jury to sentence someone to death because he is a few days older or because he scores a few points higher on an IQ test than someone who, with similar culpability, committed a similar crime yet because of his age or mental ability is categorically excluded from capital punishment.¹³⁰

3. Excessive Punishments: More Severe Than the Legislature Intended

The text of the Eighth Amendment prohibits “cruel and unusual punishments.”¹³¹ The Supreme Court has interpreted this provision to also prohibit punishments that are excessive.¹³² Although the Court’s decisions leave unclear exactly how to measure excessiveness—excessive as compared to what?¹³³—one way a sentence may violate the Eighth Amendment is by being more severe than the statutorily

¹²⁹ See *supra* note 24 and accompanying text.

¹³⁰ Philosopher Stephen Nathanson similarly argues that it would be arbitrary to fail one student for plagiarizing but not to fail, because of sympathy, another student who also plagiarized:

If I have a stated policy of failing students who plagiarize, then it is unjust for me to pass students with whom I sympathize. Whether I am sympathetic or not is irrelevant, and I am treating the student whom I do fail unjustly because I am not acting simply on the basis of desert. Rather, I am acting on the basis of desert plus degree of sympathy.

Stephen Nathanson, *Does It Matter if the Death Penalty Is Arbitrarily Administered?*, 14 PHIL. & PUB. AFF. 149, 157 (1985).

¹³¹ U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

¹³² See, e.g., *Roper v. Simmons*, 543 U.S. 551, 552 (2005) (explaining that in *Atkins* “the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders”); *Atkins v. Virginia*, 536 U.S. 304, 311 n.7 (2002) (“[W]e have read the text of the [Eighth] Amendment to prohibit all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.”); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (“[T]he Eighth Amendment bars not only those punishments that are ‘barbaric’ but also those that are ‘excessive’ in relation to the crime committed.”).

¹³³ This question is borrowed from Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571 (2005).

sanctioned punishments.¹³⁴ Thus, the Supreme Court could not, for example, require a non-death penalty state to impose this punishment.¹³⁵

When the Court ruled that mentally retarded and juvenile offenders could no longer be sentenced to death, the death penalty became an even more severe, and perhaps excessive, punishment for those still subject to it. One reason excluding some offenders whom a legislature meant to be included results in more severe punishments for those who are still included is that the punitive value of a punishment is in part a function of how many people receive the punishment. When capital punishment was imposed for many offenses—not just murder but also witchcraft, adultery, pig theft, and burning down tobacco warehouses¹³⁶—death was not, in a relative sense, an especially severe sentence. Those sentenced to death were condemned as ordinary, run-of-the-mill felons. Now, when capital punishment is reserved for the “worst of the worst” murders,¹³⁷ death is an especially severe sentence. Those sentenced to death are condemned as less than human.¹³⁸

¹³⁴ See Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 29 & n.149 (1995) (noting that “judges may not impose greater punishment than the legislature has authorized” and that the Eighth Amendment’s prohibition of excessive punishment “plainly includ[es] punishment beyond that legislatively authorized”); see also *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (holding that legislative intent determines whether cumulative punishments may be imposed for the same conduct: “[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.”).

¹³⁵ See Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 865 (1992) [hereinafter Steiker & Steiker, *Let God Sort Them Out?*] (noting that “requiring a state that does not embrace the death penalty to execute certain murderers . . . would clearly fail Eighth Amendment scrutiny because the Eighth Amendment must also protect defendants against punishment not authorized by their local communities”); cf. *United States v. Bass*, 404 U.S. 336, 348 (1971) (“[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.”).

¹³⁶ LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 42-44 (1993) (discussing crimes punishable by death in colonial America).

¹³⁷ See *supra* note 4.

¹³⁸ See Hugo Adam Bedau, *The Death Penalty in America: Yesterday and Today*, 95 DICK. L. REV. 759, 768 (1991) (“Defenders of the death penalty insist that the killings they favor are justified, desirable, legal, authorized—and therefore are ‘necessary.’ Besides, we are told, those who are condemned to die by the death penalty are less than human.”); Robert A. Burt, *Judges, Behavioral Scientists, and the Demands of Humanity*, 143 U. PA. L. REV. 179, 191-92 (1994) (noting “our current romantic obsession with the death penalty: the premise that criminal offenders are not simply different from law-abiding citizens, but that they are so different as to stand

It is not only the expression but also the experience of condemnation that becomes more severe as fewer offenders receive death sentences. Psychologists attribute this kind of relative valuing of punishments to the process of social comparison.¹³⁹ Philosophers speak in terms of the comparative nature of desert.¹⁴⁰ Regardless of how it is explained, the

altogether outside the bounds of humanity”); cf. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 361 (“The overall goal of the defense is to present a human narrative . . . so the jury will be less inclined to cast [the defendant] out of the human circle.”).

Relatedly, because imposing the death penalty is the most severe condemnation, a decision not to impose the death penalty may be interpreted as a statement that the offender’s victims are not as valued as the victims of offenders who have been sentenced to death. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 162 (1986) (“The victim’s mother cries out for the murderer to be executed and is dissatisfied with any lesser penalty, precisely because the death penalty is available as the most substantial response to willful killing in the United States at this time. Because it is available, any lesser penalty would depreciate the significance of the crime and would confer second-class status on the life, and the circumstances of the death, of the victim.”); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1391 (1988) (concluding that race-of-the-victim disparities in imposing the death penalty “indicate a devaluation of black victims: put bluntly, officials in Georgia place a higher value on the lives of whites than blacks” (internal punctuation omitted)); Charles J. Ogletree, Jr., *Black Man’s Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 32 (2002) (“Disproportionate application of the death penalty in cases where the victim is white compared to cases where the victim is black reflect a disturbing racial calculus: White lives are considered to be more valuable than black lives, because the killing of a white is treated as a more serious crime—a crime worthy of a more severe punishment—than the killing of a black.”).

¹³⁹ See generally Leon Festinger, *A Theory of Social Comparison Processes*, 7 HUM. REL. 117 (1954) (proposing that one way that people assess their own abilities is through comparisons to others); see also William Austin, *Equity Theory and Social Comparison Processes*, in *SOCIAL COMPARISON PROCESSES: THEORETICAL AND EMPIRICAL PERSPECTIVES* 279, 279 (Jerry M. Suls & Richard L. Miller eds., 1977) (“Philosophers and social scientists both seem to agree that social comparison processes are indelibly linked with perceptions of ‘fairness,’ ‘justice,’ or ‘equity.’ Scholars agree first that questions of fairness or justice inevitably arise from subjective, evaluative judgments, and second that such judgments can occur only after an individual locates himself within some frame of reference.” (citations omitted)). A related concept is relative deprivation, which explains “the important observation that feelings of satisfaction or dissatisfaction with one’s outcomes depend more on subjective standards, such as the level of outcomes obtained by salient comparison persons, than on objective prosperity.” James M. Olson & J. Douglas Hazlewood, *Relative Deprivation and Social Comparison: An Integrative Perspective*, in *RELATIVE DEPRIVATION AND SOCIAL COMPARISON: THE ONTARIO SYMPOSIUM, VOLUME 4*, at 1, 2 (James M. Olson et al. eds., 1986); see also PETER M. BLAU, *EXCHANGE AND POWER IN SOCIAL LIFE* 158-60 (1964) (discussing the principles of relative gratification and relative deprivation).

¹⁴⁰ E.g., Shelly Kagan, *Comparative Desert*, in *DESERT AND JUSTICE* 93, 98 (Serena Olsaretti ed., 2003) (“[C]omparative desert demands that my level of well-being bear a certain relation to your level of well-being, where this precise relation is itself a function of how our levels of virtue compare.”); Owen McLeod, *On the Comparative Element of Justice*, in *DESERT AND JUSTICE*, *supra*, at 123, 144 (“[A]ny total theory of justice will have to explain the fact that the justice of what you receive

conclusion that the “desert-satisfying power” of a particular punishment is relative or comparative is confirmed by a host of everyday, real-world experiences.¹⁴¹ It is readily understood by, for example, any student who after receiving a grade of “F” on a test has wondered whether anyone else also received the same grade. A student who alone receives a failing grade understands her performance on the test to have been especially bad, whereas a student who fails along with the rest of her class does not.

The comparative or relative value of grades, and by extension of rewards and punishments more generally, is even more apparent when the grades are assigned on a curve. If a curve allows only three “A” grades but the best six exams are essentially the same, the reward value of the “A” grades is excessive—that is, the three students who receive the “A” grades are being told that their work is better than the work of all but two of their classmates when it really is only better than all but five.¹⁴² Similarly, if a curve allows only three students to receive “F” grades but the worst six exams are essentially the same, then the punishment value of the “F” grades is excessive—that is, assigning the “F” grades tells three students that their work is worse than all but two of their classmates when it really is only worse than all but five.

The categorical exclusions adopted in *Atkins* and *Roper* act like a forced curve, allowing the death penalty to be imposed in fewer cases than some legislatures had deemed warranted. Prior to *Atkins*, twenty states had not excluded mentally retarded offenders from capital punishment, the same number that prior to *Roper* had allowed juveniles to be

can have something to do with how it compares to what others receive.”); Peter Simpson, *Book Review*, NOTRE DAME PHIL. REVIEWS (Jul. 1, 2004), <http://ndpr.nd.edu/review.cfm?id=1451> (reviewing SERENA OLSARETTI, ED. *DESERT AND JUSTICE* (Oxford, 2003)) (arguing that “justice in distribution is secured if my share is related to my desert as your share is related to your desert. Then I get absolutely what I *deserve* because I get what I comparatively deserve.”).

¹⁴¹ McLeod, *supra* note 140, at 144. The examples presented here involving grades are inspired by similar examples presented in, among others, McLeod, *supra* note 140, and Nathanson, *supra* note 130.

¹⁴² This is the reverse of the problem of grade inflation, the problem that awarding too many “A’s” diminishes the grade’s value. See Simpson, *supra* note 140. (“[S]uppose an excellent student absolutely deserves an A but the professor gives mediocre students As as well. Then, in this case, the A grade fails to be appropriate to the excellent student’s desert since it fails to indicate his superiority over the mediocre students.”). Awarding not enough “A’s” has the opposite effect, increasing the grade’s value.

sentenced to death.¹⁴³ In these states, after *Atkins* and *Roper*, the punitive value of the death penalty is enhanced for the non-juvenile and non-mentally retarded offenders who remain subject to this punishment.¹⁴⁴

Moreover, had these legislatures known when they enacted their death penalty statutes that the Supreme Court would eventually rule that mentally retarded and juvenile offenders could not be sentenced to death—that is, had the legislatures known that only some of the offenders that they considered worthy of capital punishment could receive this punishment—the legislatures might have decided not to sentence any offenders to death, or to sentence a different subset of offenders.¹⁴⁵ Because the death penalty is qualitatively different from all other kinds of punishments,¹⁴⁶

¹⁴³ *Roper v. Simmons*, 543 U.S. 551, 552 (2005). As the Court explained:

When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.

Id. at 564 (citation omitted).

¹⁴⁴ See Andrew von Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 MD. L. REV. 6, 28 (1983) (“If A and B commit a given kind of crime under circumstances suggesting similar culpability, they deserve similar punishments. Imposing unequal punishments on them . . . unjustly treats one as though he were more to blame for his conduct than the other.”); see also William S. Laufer & Nien-hê Hsieh, *Choosing Equal Injustice*, 30 AM. J. CRIM. L. 343, 347-49 (2003) (arguing that failing to punish some offenders has the effect of imposing on those who are punished “a burden of relative disadvantage,” which causes them “to be punished more than they deserve”).

¹⁴⁵ Although it might seem unlikely at best that a legislature would be motivated by concern for fairness to criminal defendants, such skepticism might reflect an unduly pessimistic view of legislatures. As Professor Ronald Wright has argued in a somewhat different context,

Such pessimism about legislatures in criminal justice . . . is overstated. The facts on the ground tell us that legislatures sometimes vote for things that benefit the defense even when courts interpreting the Constitution do not demand them. For instance, states have long provided defense counsel in a broader range of cases than the Constitution strictly requires. Given the minimal levels of competence required to satisfy the Sixth Amendment and due process guarantee of effective counsel, most states already fund their systems at levels higher than the bare minimum that the Constitution would tolerate.

Wright, *supra* note 2, at 254-55 (footnote omitted).

¹⁴⁶ As the Supreme Court has stated:

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its

the offenders who are sentenced to death must be qualitatively different from all other people who commit crimes, even the crime of murder.¹⁴⁷ When deciding the statutory criteria that define this category of “worst of the worst” offenses, legislatures make assessments about which kinds of murders are both similar to each other and different from other kinds of murders. For example, a legislature might decide that the murder of a child and the murder of a police officer are sufficiently similar to each other—perhaps because both cause a special kind of harm to society—and are also sufficiently more harmful than other more ordinary murders to justify capital punishment. The legislature is not deciding in an abstract, Platonic Forms sense which murders are worthy of capital punishment but is instead making relative assessments about which murders are worse than all other murders; therefore, excluding from capital punishment a certain subset of offenders who murder children or police officers, as the Court did in *Atkins* and *Roper*, challenges the legislature’s entire assessment of which offenses merit the death penalty. Had this legislature known that the Supreme Court would one day prohibit sentencing to death any offender who, for example, before his eighteenth birthday murdered a child or a police officer, the legislature might have decided not to impose the death penalty on any offenders who commit these offenses. Executing non-juvenile and non-mentally retarded offenders whose death sentences were imposed under statutes that had, before *Atkins* and *Roper*, allowed juvenile or mentally retarded offenders also to be sentenced to death presumes that the legislatures that enacted those statutes would have believed

rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Rummel v. Estelle, 445 U.S. 263, 272 (1980) (quoting *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)); see also *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (stating that “the penalty of death is qualitatively different from a sentence of imprisonment, however long”); cf. Nathanson, *supra* note 130, at 162 (“I conclude then that the argument from arbitrariness has special force against the death penalty because of its extreme severity and its likely uselessness. The arbitrariness of other punishments may be outweighed by their necessity, but the same cannot be said for capital punishment.”).

¹⁴⁷ *Godfrey v. Georgia*, 446 U.S. 420, 432 (1980) (reversing a death sentence because “[t]he petitioner’s crimes cannot be said to have reflected a consciousness materially more ‘depraved’ than that of any person guilty of murder”); *Furman*, 408 U.S. at 248 n.11 (Douglas, J., concurring) (requiring capital sentencing schemes to provide a “meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not”).

these non-juvenile and non-mentally retarded offenders to still deserve the death penalty had it known that others it believed to deserve the death penalty would be excluded from this punishment. But this presumption might be wrong. Just as a teacher might prefer to not fail anyone if she could not fail everyone whom she believed to deserve to fail, a legislature might have decided to not sentence any offenders to death if it could not sentence to death all the offenders whom it believed to deserve this punishment. And while students might not have a legal right to the grade that their teacher thinks that they deserve, criminal defendants do have a constitutional right to a punishment that is not excessive—that is, to a punishment that is not more severe than the punishment that their legislature thinks that they deserve.¹⁴⁸

II. THE BIGGER PICTURE: SEEKING FAIRNESS AND CONSISTENCY

A. *Inequalities Abound (But That's No Excuse for Adding More)*

Categorical exclusions are, of course, not the only reason that equally culpable offenders will sometimes receive unequally severe punishments.¹⁴⁹ Prosecutors' decisions not to seek the death penalty for reasons unrelated to culpability—reasons such as the defendant's agreement to plead guilty in exchange for a lesser charge, or the wishes of the victim's family—likely account for most cases, certainly for more cases than will the categorical exclusions adopted in *Atkins* or *Roper*.¹⁵⁰ But the fact that a variety of factors cause some equally culpable offenders to receive unequally severe punishments does not mean that the disparities that *Atkins*

¹⁴⁸ See Steiker & Steiker, *Let God Sort Them Out?*, *supra* note 135, at 865 (noting that “the Eighth Amendment must also protect defendants against punishment not authorized by their local communities” and that “a disassociation of individual sentencing decisions from a state’s internal consensus regarding just punishment would . . . violate the Eighth Amendment”).

¹⁴⁹ See *id.* at 867 (noting that “vast arbitrariness exists in the operation of the criminal justice system prior to sentencing—in the investigation of crime, the charging decision, the plea offer (if any), the decision to seek the death penalty, and the effectiveness of defendant’s counsel”).

¹⁵⁰ Scott W. Howe, *The Constitution and Capital Sentencing: Pursuing Justice and Equality*, 60 *FORDHAM L. REV.* 749, 788 (1992) (stating that “if anything is clear about the administration of the death penalty, it is that most death-eligible offenders escape the death penalty through discretionary decisions made outside the sentencing proceeding”).

and *Roper* cause are not problematic. Indeed, a growing number of commentators are arguing for increased honesty and transparency in plea bargaining and other exercises of prosecutorial discretion, so as to diminish disparities in sentences among equally culpable offenders.¹⁵¹ While *Atkins* and *Roper* might not create a huge number of additional disparities, the desired trend is toward fewer rather than more unequal sentences among equally culpable offenders.

Additionally, the potential for disparities increases as courts consider calls to extend the “*Atkins* logic” to traits other than mental ability and age. Many commentators have noted that such characteristics as mental illness, alcohol and other drug addictions, a history of childhood abuse, and an impoverished background are especially prevalent among death row inmates.¹⁵² All of these characteristics, like age and mental ability, likely correlate with culpability. For example, as the severity of a psychotic disorder or a substance abuse

¹⁵¹ As the Report of the Massachusetts Governor’s Council on Capital Punishment stated:

[I]n the special context of the death penalty, it is essential to ensure that local prosecutorial discretion is exercised in a reasonably rational and consistent manner, so that—as much as humanly possible—like cases are treated alike, and different cases are treated differently. This basic principle was central to the U.S. Supreme Court’s modern constitutional mandate for capital punishment, as expressed in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), and it remains a constitutional requirement for all capital sentencing systems today.

Report of the Massachusetts Governor’s Council on Capital Punishment, 80 IND. L.J. 1, 12 (2005); see also Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 109 (2002) (proposing that “hard” prosecutorial screening systems can, among other benefits, diminish unequal treatment).

¹⁵² E.g., Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 766 (2005) (noting that capital defendants “very frequently are extremely intellectually limited, are suffering from some form of mental illness, are in the powerful grip of a drug or alcohol addiction, are survivors of childhood abuse, or are the victims of some sort of societal deprivation (be it poverty, racism, poor education, inadequate health care, or some noxious combination of the above)” (citing DOROTHY OTNOW LEWIS, *GUILTY BY REASON OF INSANITY: A PSYCHIATRIST EXPLORES THE MINDS OF KILLERS* (1998) (documenting the prevalence of organic mental defects and histories of childhood abuse among death row inmates); Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1172-73 (1999) (documenting the prevalence of histories of childhood abuse among murderers in general and capital defendants in particular); Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 566, 585 (1995) (documenting the prevalence of impoverished backgrounds and histories of drug or alcohol abuse among death row inmates))).

disorder increases, culpability tends to decrease.¹⁵³ Someone who was abused or neglected as a child is likely to be less culpable for her actions than someone who enjoyed a well-cared-for childhood, in the same way that a juvenile or mentally retarded offender is likely to be less culpable than a non-juvenile or non-mentally retarded offender.¹⁵⁴ As a result of this similarity, treating these additional categories of offenders differently from juvenile and mentally retarded offenders with respect to eligibility for the death penalty might be unjust, or—as one scholar has argued—might even be a violation of equal protection.¹⁵⁵ Several state court justices have already expressed agreement with the argument that *Atkins* should apply to mentally ill offenders.¹⁵⁶ If these additional characteristics, or any other imperfect correlates of culpability, become grounds for additional categorical exclusions, then an increasing number of offenders will become ineligible for the death penalty not because they are in fact less culpable but because they possess traits that make them likely to be less culpable. Death sentences will then increasingly become not so much pronouncements of actual culpability as actuarial assessments of likely culpability.

It is possible to think that avoiding the risk that juries will sentence to death some juvenile or mentally retarded offenders who do not deserve this punishment justifies whatever inequalities categorical exclusions might cause. The Court itself suggested such a possibility in both *Atkins* and

¹⁵³ See Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1210 (2005) (suggesting that “[a]n offender’s mental illness or addiction to drugs reduces his or her capacity to obey the law, thus making the offender less blameworthy”).

¹⁵⁴ Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1179 (1999) (“Psychological and medical literature reveals how physical abuse as a child may have long-term negative repercussions for the defendant’s ability to make appropriate judgments, to understand the consequences of his actions, and to control his behavior.”); Paul Litton, *The “Abuse Excuse” in Capital Sentencing Trials: Is It Relevant to Responsibility, Punishment, or Neither?*, 42 AM. CRIM. L. REV. 1027, 1071 (2005) (“In recognizing that the death penalty is not intended for all murder convicts, it is worth stressing that defendants who suffered severe abuse and neglect were deprived of a safeguard in comparison to others who were not treated as such.”).

¹⁵⁵ Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293, 294 (2003) (“The ultimate conclusion is that distinguishing between people with significant mental illness, people with mental retardation, and juveniles in the application of capital punishment violates the Equal Protection Clause.”).

¹⁵⁶ See, e.g., *Corcoran v. State*, 774 N.E.2d 495, 502-03 (Ind. 2002) (Rucker, J., dissenting); *State v. Nelson*, 803 A.2d 1, 48-49 (N.J. 2002) (Zazzali, J., concurring).

Roper.¹⁵⁷ But accepting categorical exclusions as risk-avoiding measures does not make the consequences any less unjust for those offenders who remain subject to the death penalty.¹⁵⁸ Moreover, no evidence exists that mentally retarded or juvenile offenders are especially likely to be wrongfully sentenced to death. Indeed, the Court's reliance on the "infrequent" and "uncommon" executions of juvenile and mentally retarded offenders to support its findings of a national consensus against such sentences¹⁵⁹ is inconsistent with its suggestion that categorical exclusions are needed to address special risks of wrongful death sentences.¹⁶⁰

¹⁵⁷ *Roper v. Simmons*, 543 U.S. 551, 572-73 (2005) (referring to the "risk [of] allowing a youthful person to receive the death penalty despite insufficient culpability"); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) ("Mentally retarded defendants in the aggregate face a special risk of wrongful execution.").

¹⁵⁸ The argument that fairness to those who remain subject to the death penalty matters in evaluating the desirability of categorical exclusions is not meant to suggest that the harms of erroneous exclusion are equal to the harms of erroneous inclusion. But so long as the Supreme Court is willing to allow anyone to be sentenced to death, death sentences should be as fair as possible. Fairness is diminished when equally culpable offenders receive unequally severe sentences.

¹⁵⁹ *Roper*, 543 U.S. at 553 (noting that "even in the 20 States without a formal prohibition, the execution of juveniles is infrequent"); *Atkins*, 536 U.S. at 316 (observing that "even in those States that allow the execution of mentally retarded offenders, the practice is uncommon").

¹⁶⁰ See *Roper*, 543 U.S. at 620-21 (Scalia, J., dissenting) (noting that "the Court itself acknowledges that the execution of under-18 offenders is 'infrequent' even in the States 'without a formal prohibition on executing juveniles,' suggesting that juries take seriously their responsibility to weigh youth as a mitigating factor" (citation omitted)); cf. Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1144 (2006) ("If the Court is correct that jurors are incapable of assessing whether the death penalty may be applicable to juveniles and other categories of defendant, then looking to how often juries apply the death penalty is entirely illogical.").

The Court's discussions of special risks also included the possibility that some jurors might inappropriately consider evidence of an offender's mental retardation or youth as supporting an aggravating, rather than mitigating, factor. *Roper*, 543 U.S. at 573 ("In some cases a defendant's youth may even be counted against him."); *Atkins*, 536 U.S. at 321 (stating that "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury"). The same is also true, though, of many kinds of evidence that defendants commonly present to sentencing juries. See John M. Fabian, *Death Penalty Mitigation and the Role of the Forensic Psychologist*, 27 LAW & PSYCHOL. REV. 73, 90 (2003) ("[M]ental illness, substance abuse, and having a deprived and abusive childhood, factors that would appear to be mitigating and arising sympathy, may be viewed as aggravating and suggestive of future dangerousness."); Welsh S. White, *A Deadly Dilemma: Choices by Attorneys Representing "Innocent" Capital Defendants*, 102 MICH. L. REV. 2001, 2035 (2004) (explaining that evidence of a defendant's problems, such as mental illness or childhood abuse, is "double-edged" because "while it does explain where the defendant has come from and how he got to be the way he is, it also has the potential to not only eliminate any lingering doubts jurors might have had as to the defendant's guilt, but also to strengthen their perception that sparing his life will enhance the danger to

Another potential pragmatic argument in favor of categorical exclusions is that they are a lesser of evils, or an imperfect means justified by the desired ends of fewer offenders who may be sentenced to death. The problem with this argument, though, is that it is not possible to predict all of the ends that *Atkins* and *Roper* will produce. Certainly, one result is that some offenders who were sentenced to death will not be executed.¹⁶¹ But the decisions likely will have other effects as well. For example, because *Atkins* and *Roper* proclaim to be making the death penalty more just, these

society, a consideration that empirical data indicate will weigh heavily in the penalty jury's decision"). The fact that evidence is "double-edged," however, does not mean that it useless to a defendant: "even double-edged mitigating evidence can be used to present a powerful case for life by causing the jury to empathize with the defendant." White, *supra*, at 2036.

The Court further noted the possibility that mentally retarded offenders are likely to confess falsely. *Atkins*, 536 U.S. at 320 (noting "the possibility of false confessions"). But this is a guilt-phase rather than sentencing-phase problem. *Cf. id.* at 352 (Scalia, J., dissenting) ("We have never before held it to be cruel and unusual punishment to impose a sentence in violation of some *other* constitutional imperative."). Moreover, recent research suggests that other characteristics—including factual innocence—also lead to false confessions. Saul M. Kassir, *On the Psychology of Confessions: Does Innocence Put Innocents At Risk?*, 60 AM. PSYCHOL. 215 (2005). Of the 123 cases since 1973 that the Death Penalty Information Center identifies as exonerations, four were juveniles and three were either diagnosed as mentally retarded or had an IQ score suggestive of mental retardation. *See* Death Penalty Info. Ctr., *Innocence: List of Those Freed from Death Row*, <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited Jul. 5, 2006). And while it is impossible to know the extent to which the age or mental ability of these seven defendants contributed to their wrongful convictions, most of their trials were marred by the kinds of misconduct that seem to be present in a great many wrongful conviction cases: witnesses who committed perjury or prosecutors who suppressed or inappropriately used evidence. *Id.*; *see also* Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 481 (1996) (discussing witness perjury and prosecutorial misconduct as sources of wrongful convictions in capital cases).

¹⁶¹ These offenders include seventy one juveniles who were on death row as of December 2004. Death Penalty Info. Ctr., *Juvenile Offenders Who Were on Death Row*, <http://www.deathpenaltyinfo.org/article.php?did=204&scid=27#streibcaselist> (last visited Jul. 5, 2006). The number of offenders whose death sentences will be reversed because of *Atkins* is still being sorted out, as courts hear claims of mental retardation. *See* Nava Feldman, Annotation, *Application of Constitutional Rule of Atkins v. Virginia that Execution of Mentally Retarded Persons Constitutes "Cruel and Unusual Punishment" in Violation of Eighth Amendment*, 122 A.L.R.5th 145 (2004) (collecting cases).

While considering the effects of the Court's decisions on these individual offenders is important, it is also important to consider the decisions' wider effects. *Cf.* Ogletree, *supra* note 138, at 34-35 ("As an abolitionist, I feel that we must constantly be asking what the likely outcome will be from any arguments we raise against the death penalty."); Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417, 431 (2002) [hereinafter Steiker & Steiker, *Should Abolitionists Support Legislative "Reform"*] (proposing that abolitionists "must have a long-term strategy that allocates some resources toward current cases and some toward larger goals").

decisions risk diminishing opposition to the death penalty among those who fear that it cannot be administered justly.¹⁶² Additionally, lawmakers who might have been willing to support reforms that really could make the death penalty more just—reforms such as increasing funding for defense counsel¹⁶³ or eliminating death qualification of jurors at the guilt stage¹⁶⁴—might now be less inclined to support such proposals given the possibility that the Supreme Court will take adoption of such legislation as evidence of a national consensus and declare that the Constitution makes the legislature's decision irreversible.¹⁶⁵ Some evidence suggests that the *Atkins* decision might have diminished legislative interest in reforming the death penalty: in 2001, the year preceding the *Atkins* decision, "lawmakers in nearly every state that retained the death penalty sponsored a series of capital punishment-related bills that have paved the way for unprecedented reform,"¹⁶⁶ but since 2001, such legislative activity has been scarce.¹⁶⁷ Of course,

¹⁶² See *supra* note 1.

¹⁶³ See sources cited *supra* note 2.

¹⁶⁴ See Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45, 88 (2005) (noting a "robust scholarly consensus that death-qualification of jurors lowers the effective standard of proof in capital cases").

¹⁶⁵ See Jacobi, *supra* note 160, at 1152 (arguing that "anti-death penalty actions of Supreme Court Justices could result in higher rates of death penalty legislation and executions, as states protect their policymaking powers. Thus the feedback effects between courts and legislatures makes judicial reliance on state legislation subjective and its effects unpredictable.").

¹⁶⁶ Death Penalty Info. Ctr., *The Death Penalty in 2001: Year End Report 4*, <http://www.deathpenaltyinfo.org/YearEndReport2001.pdf> (Dec. 2001) (noting that these measures included bans on executing mentally retarded offenders enacted in five states, calls for a moratorium on executions in eighteen states, legislation providing inmates with greater access to post-conviction DNA testing enacted in seventeen states, and changes to provide better legal representation for indigent defendants adopted in "many death penalty states"); see also Steiker & Steiker, *Should Abolitionists Support Legislative "Reform"*, *supra* note 161, at 417-18 (discussing legislative activity).

¹⁶⁷ In each of the years from 2002 to 2005, only a handful of state legislatures adopted death penalty reforms. Death Penalty Info. Ctr., *The Death Penalty in 2005: Year End Report 2*, <http://www.deathpenaltyinfo.org/yearend05.pdf> (Dec. 2005) (listing as state developments that Illinois and New Jersey continued to ban executions, that Kansas and New York failed to pass new death penalty legislation after those states' highest courts overturned prior death penalty laws, that the New Mexico legislature came close to voting to abolish the death penalty, that the Massachusetts legislature voted against the governor's proposed death penalty, and that California and North Carolina appointed commissions to study the death penalty system); Death Penalty Info. Ctr., *The Death Penalty in 2004: Year End Report 1-2*, <http://www.deathpenaltyinfo.org/DPICyer04.pdf> (Dec. 2004) (reporting that New York's legislature did not enact new death penalty legislation to replace the death penalty statute that the state's highest court ruled unconstitutional, that California's legislature commissioned a study of that state's death penalty, that Illinois continued its moratorium, and that New Jersey halted executions over concerns about execution

such a change in legislative activity is undoubtedly the result of many factors, but the possibility that the *Atkins* decision is one of those factors suggests that the evils of categorical exclusions might, in the long run, not be lesser after all.¹⁶⁸

B. Categorical Exclusions and the Furman-Lockett "Tension"

In *Furman v. Georgia*, the Supreme Court's first real foray into regulating the death penalty,¹⁶⁹ the Court decreed that this punishment must be administered either consistently or not at all.¹⁷⁰ Several years after *Furman*, the Court ruled in

methods); Death Penalty Info. Ctr., *The Death Penalty in 2003: Year End Report* 3, <http://www.deathpenaltyinfo.org/YER-03-F.pdf> (Dec. 2003) (noting comprehensive criminal justice reform adopted by the Illinois legislature and a vote by the North Carolina senate in favor of a moratorium on executions); Death Penalty Info. Ctr., *The Death Penalty in 2002: Year End Report* 4, <http://www.deathpenaltyinfo.org/yrendrpt02.pdf> (Dec. 2002) (describing, in addition to reforms enacted to comply with the Supreme Court's decisions in *Atkins v. Virginia* and *Ring v. Arizona*, the moratorium instituted in Maryland and the one continued in Illinois, Indiana's law prohibiting executions of offenders under 18, Pennsylvania's law allowing post-conviction DNA testing, and heightened requirements for trial attorneys in California and Washington).

¹⁶⁸ It might be easier to embrace categorical exclusions as a lesser evil but for the availability of arguments against the death penalty that are not contingent upon what evils actually result. Many writers, for example, have persuasively argued that the basic problem with all capital sentencing is the impossibility of achieving infallibility. See, e.g., CHARLES L. BLACK, JR., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 96 (1974) ("Though the justice of God may indeed ordain that some should die, the justice of man is altogether and always insufficient for saying who these may be."); see also Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1064 (1978) ("If infallibility is to be required for any case, it should be required where the deprivation is irrevocable; and if infallibility is to be required in any case in which the deprivation is irrevocable, it should be required where the irrevocable deprivation is of life itself.").

¹⁶⁹ See Carol S. Steiker, *Remembering Race, Rape, and Capital Punishment*, 83 VA. L. REV. 693, 704 (1997) (book review) (noting that "the Supreme Court first 'constitutionalized' death penalty law in *Furman v. Georgia*"); Note, *Cruel and Unusual Punishments in The Supreme Court, 1971 Term*, 86 HARV. L. REV. 76, 76 (1972) ("In *Furman v. Georgia* the Supreme Court for the first time ruled directly on the constitutionality of capital punishment under the cruel and unusual punishments clause of the eighth amendment." (footnote omitted)).

¹⁷⁰ *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (per curiam) (holding that the Eighth Amendment requires capital punishment to be applied consistently); see also *Callins v. Collins*, 510 U.S. 1141, 1147 (1994) (Blackmun, J., dissenting from denial of certiorari) ("There is little doubt now that *Furman's* essential holding was correct. Although most of the public seems to desire, and the Constitution appears to permit, the penalty of death, it surely is beyond dispute that if the death penalty cannot be administered consistently and rationally, it may not be administered at all."); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (referring to "the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all").

Lockett v. Ohio that to ensure fairness to individual offenders, capital sentencing juries must be allowed to consider a nearly limitless¹⁷¹ range of reasons for not imposing the death penalty.¹⁷² Many commentators have accused the *Furman* and *Lockett* decisions of creating a “tension” between consistency and fairness.¹⁷³ The Supreme Court has, on occasion, expressed the same idea.¹⁷⁴ The root of the problem is that procedures adopted to enhance one goal often have the unintended consequence of diminishing the other. For example, since

¹⁷¹ Under *Lockett*, the jury must consider all relevant mitigating evidence. What counts as relevant mitigating evidence is “evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.” *Tennard v. Dretke*, 542 U.S. 274, 284-85 (2004) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990) (internal citation omitted)). For an argument that only culpability-related mitigating evidence is constitutionally required, see Steiker & Steiker, *Let God Sort Them Out?*, *supra* note 135, at 840.

¹⁷² *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (“[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”); see also *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (“[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” (internal citation omitted)); *Jurek v. Texas*, 428 U.S. 262, 271 (1976) (plurality opinion) (“A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.”).

¹⁷³ E.g., Vivian Berger, “Black Box Decisions” on Life or Death—If They’re Arbitrary, Don’t Blame the Jury: A Reply to Judge Patrick Higginbotham, 41 CASE W. RES. L. REV. 1067, 1080 (1991) (proposing that “the Court’s dual sentencing objectives strongly resemble Siamese twins—locked at the hip but straining uncomfortably in opposite directions”); Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1155 (1980) (“Thus, if death as a punishment requires both maximum flexibility and non-arbitrariness, and these requirements cannot both be met (because flexibility and nonarbitrariness must vary inversely), then death cannot be a permissible punishment.”); Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1196 (1991) (referring to “the tension between *Furman*’s call for guided discretion and *Lockett*’s requirement of unrestricted presentation of relevant mitigating evidence”); see also Stephen P. Garvey, “As the Gentle Rain from Heaven”: Mercy in Capital Sentencing, 81 CORNELL L. REV. 989, 1001 (1996) (“Commentators have often remarked that *Furman*’s mandate of consistency and *Woodson*’s mandate of individualization compete with one another at some level.”).

¹⁷⁴ See *Tuilaepa v. California*, 512 U.S. 967, 973 (1994) (“The objectives of these two inquiries can be in some tension . . .”); *Romano v. Oklahoma*, 512 U.S. 1, 6-7 (1994) (“[T]he Eighth Amendment’s concern that the death penalty be both appropriate and not randomly imposed requires the States to perform two somewhat contradictory tasks in order to impose the death penalty.”); *Franklin v. Lynaugh*, 487 U.S. 164, 182 (1988) (plurality opinion) (“Arguably these two lines of cases . . . are somewhat in ‘tension’ with each other.” (citation omitted)); *California v. Brown*, 479 U.S. 538, 544 (1987) (O’Connor, J., concurring) (“[T]ension . . . has long existed between the two central principles [of consistency and individualized sentencing] of our Eighth Amendment jurisprudence.”).

Furman, one way that legislatures have attempted to narrow the category of offenders who are eligible for the death penalty is by enacting lists of statutory aggravating factors and allowing juries to impose the death penalty only when one or more of the factors on the list is present.¹⁷⁵ The purpose of limiting capital punishment to those cases in which one or more aggravating factors is present is to achieve consistency among those offenders who are sentenced to death.¹⁷⁶ But limiting capital punishment to crimes in which certain statutory aggravating factors are present achieves consistency without compromising individual fairness only if the list of aggravating factors is neither under- nor over-inclusive.¹⁷⁷

¹⁷⁵ These aggravating factors must “reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder” and “genuinely narrow the class of persons eligible for the death penalty.” *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *see also* *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (“[A State must] define the crimes for which death may be the sentence in a way that obviates standardless sentencing discretion.” (alterations and internal quotations omitted)).

¹⁷⁶ “[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.” *Zant*, 462 U.S. at 878.

¹⁷⁷ This is arguably the most serious pragmatic problem with capital punishment. Present statutes are undoubtedly over-inclusive. *See* sources cited *supra* note 6. Legislatures might remedy this problem by limiting capital punishment to one or two crimes for which there is broad agreement that if any crime justifies the death penalty, it would be these. Two fairly obvious candidates for such crimes are the murder of a child and the murder of more than one person. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1556 (1998) (“Murders involving child victims are highly aggravating, but otherwise jurors claim that the victim’s status and standing make little difference.”); David McCord, *An Open Letter to Governor George Ryan Concerning How to Fix the Death Penalty System*, 32 LOY. U. CHI. L.J. 451, 455 (2001) (suggesting multiple victims as an example of the worst kind of murder); Conference, *The Death Penalty in the Twenty-First Century*, 45 AM. U. L. REV. 239, 345 (1995) (remarks of Diann Rust-Tierney, Director of the ACLU Capital Punishment Project and Vice Chair of the National Coalition to Abolish the Death Penalty) (same). But this approach raises the problem of under-inclusiveness. The idea that legislatures are capable of constructing a list of aggravating circumstances that will succeed both in making all offenders who deserve the death penalty eligible for this punishment and in excluding all offenders who do not deserve this punishment might be wishful thinking:

The response of the states to *Furman* was a valiant effort to introduce evenhandedness where irregularity had prevailed. But the outcome has been no more successful than that of the prior system of capital punishment. This failure has not resulted from lack of effort but rather from the impossibility of fashioning an acceptable method of administering capital punishment while maintaining the system of rights that our Constitution mandates.

Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 928 (1982); *see also* Note, *The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599, 1607 (2001) (“[T]he method of distinguishing the worst of the worst is no more precise now than it was prior to *Furman*. The moral determination

Otherwise, as Justice Blackmun suggested, “[a] step toward consistency is a step away from fairness.”¹⁷⁸

The procedural requirements of *Lockett* produce the same kind of problem. The goal of allowing defendants to present unlimited mitigation evidence is to ensure that a jury will not impose a death sentence when a lesser sentence is deserved.¹⁷⁹ But allowing juries to consider unlimited mitigation evidence—including evidence of factors not related to culpability—invites its own inequalities.¹⁸⁰ For example, under *Lockett*, a jury could decide not to impose the death penalty for such non-culpability-related reasons as sympathy for the offender’s family or admiration for the offender’s behavior in prison.¹⁸¹ Or the jury could make the opposite decision, to impose the death penalty, for the opposite reasons: lack of sympathy or admiration.¹⁸² Either way, the result is diminished consistency, or unequal sentences for equal culpability.

Given that requiring legislatures to specify aggravating factors or to in some other way narrow the category of offenders

involved in this choice may render impossible a rational and precise description of the types of defendants who should be put to death.”).

¹⁷⁸ *Callins v. Collins*, 510 U.S. 1141, 1149 (1994) (Blackmun, J., dissenting from the denial of certiorari).

¹⁷⁹ *See Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (“By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.”); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant’s character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.”).

¹⁸⁰ Stephen R. McAllister, *The Problem of Implementing a Constitutional System of Capital Punishment*, 43 KAN. L. REV. 1039, 1064 (1995) (“The notion of guided discretion is destroyed and the goal of consistent results is unattainable if the sentencer’s discretion is guided with respect to aggravating circumstances but unlimited in granting mercy.”); Steiker & Steiker, *Sober Second Thoughts*, *supra* note 3, at 384; *see also Penry v. Lynaugh*, 492 U.S. 302, 360 (1989) (Scalia, J., concurring in part and dissenting in part) (“The decision whether to impose the death penalty is a unitary one; unguided discretion not to impose is unguided discretion to impose as well.”).

¹⁸¹ Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 266 (arguing that “the Court’s broad conception of individualization—extending far beyond truly ‘mitigating’ factors (in terms of reducing moral culpability)—prevents states from developing any consistent theory of the goal or goals behind their capital statute; a defendant must be free to argue against the death penalty on the basis of any plausibly relevant consideration, including evidence of familial sympathy, good character traits, and future good behavior”).

¹⁸² *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987) (observing that “the power to be lenient [also] is the power to discriminate” (quoting K. DAVIS, DISCRETIONARY JUSTICE 170 (1973))).

who can receive a death sentence promotes consistency but jeopardizes fairness, and that prohibiting legislatures from limiting mitigation evidence promotes fairness but jeopardizes consistency, it might be tempting to conclude that one of these rules must go. This would not be a novel conclusion; Justice Scalia, for one, has stated that because *Lockett* and *Furman* are “rationally irreconcilable,” and because *Furman* is connected less tangentially than *Lockett* to the original meaning of the Eighth Amendment, he will “not vote to uphold an Eighth Amendment claim that the sentencer’s discretion has been unlawfully restricted.”¹⁸³

Such a solution, however, fails to solve the problem, because consistency requires fairness. If a particular offender’s culpability is inaccurately determined, then not only will his sentence be unfair but consistency also will be diminished. The death sentence of an offender who deserves a sentence of a term of imprisonment is unjust in two ways: it is unfair to him in an absolute, noncomparative sense because it is not commensurate with the wrongfulness of his acts and his culpability for those acts, and it is also inconsistent because it is more severe than the sentences received by offenders who neither are less culpable nor committed less wrongful acts. The same is true if the offender receives a sentence of a term of imprisonment when he deserves to be sentenced to death. His sentence is unfair (to others if not to the offender himself)¹⁸⁴

¹⁸³ *Walton v. Arizona*, 497 U.S. 639, 673 (1990) (Scalia, J., concurring); see also *Callins*, 510 U.S. at 1141-42 (Scalia, J., concurring in denial of certiorari) (“[T]his Court has attached to the imposition of the death penalty two quite incompatible sets of commands: The sentencer’s discretion to impose death must be closely confined, but the sentencer’s discretion not to impose death (to extend mercy) must be unlimited.” (citations omitted)).

¹⁸⁴ Some scholars have proposed that an unfairly lenient sentence is a wrong against the offender, who has a “right to punishment.” See Lloyd L. Weinreb, *The Complete Idea of Justice*, 51 U. CHI. L. REV. 752, 758 n.14 (1984) (“Hegel, emphasizing that punishment responds to the aspect of wrongdoing, said that ‘punishment is regarded as containing the criminal’s right and hence by being punished he is honoured as a rational being.’” (quoting G. HEGEL, *PHILOSOPHY OF RIGHT* 71 (T. Knox trans. 1942))).

Here, “unfair” is used to mean “undeserved.” The wrong created by imposing an unfairly lenient sentence is experienced if not by the offender himself then at least by others whose sentences are not so lenient. See Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 74 (2005) (“[U]niformity is based on concepts of fairness—fairness to other offenders (who could justly complain if this defendant received a lighter penalty for the same conduct), and fairness to the defendant (who could justly complain if he were punished more severely than other equally blameworthy offenders).”). But see Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 U. PA. L. REV. 795, 825 (1998) (stating that this idea suffers from “profound irony”). Recently, the topic of

because it is less severe than he deserves, and it is inconsistent with the more severe sentences received by other offenders who are equally culpable. Consistency and fairness thus both require the same thing—that all offenders receive sentences that are neither more nor less severe than they deserve.¹⁸⁵

If the exclusions adopted in *Atkins* and *Roper* really did, as the Court conveyed, affect only those offenders who are less culpable than other offenders, then these decisions would promote both consistency and fairness. But to the extent that *Atkins* and *Roper* exclude some offenders who are not necessarily less culpable than those offenders who remain included, these decisions advance neither of capital punishment's sentencing goals. Moreover, by failing to address the inequalities that *Atkins* and *Roper* might cause, the Court created an impression that the exclusions will only enhance fairness and consistency—an impression that may provide false comfort to those who do not oppose the death penalty in all instances but who nevertheless do care that this punishment is administered justly.

CONCLUSION

Contrary to the Supreme Court's contentions in *Atkins* and *Roper*, juvenile and mentally retarded offenders are not necessarily less culpable for their crimes than are non-juvenile and non-mentally retarded offenders. Because juvenile and mentally retarded offenders are not necessarily less culpable,

unfair leniency has been addressed in the context of considering whether mercy is consistent with fairness. See, e.g., Steiker & Steiker, *Let God Sort Them Out?*, *supra* note 135, at 864 (observing that "[d]iscrimination in the dispensation of mercy and discrimination in the imposition of death create exactly the same inequality problem in any given pool"). Although mercy creates problems for consistency, it is worth noting that some clemency decisions enhance consistency. For cases in which a clemency decision enhanced consistency, see Louis D. Bilonis, *Legitimizing Death*, 91 MICH. L. REV. 1643, 1701 (1993) ("Ex-Marine Harold Glenn Williams' death sentence was commuted by the Board due to concerns about the proportionality of the sentence. A codefendant who entered a plea agreement received only a ten-year sentence, despite having been the 'ringleader' of the murder."); Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 627 (1991) ("I am impelled to commute the sentence of Ames to the same sentence received by his cohort not for any sympathy for Ames, but in order that it may not be said that Ohio failed in comparative justice." (quoting former Ohio governor Thomas Herbert)).

¹⁸⁵ Stephen P. Garvey, *Is It Wrong To Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319, 1330 (2004) ("Like cases must be treated alike. Justice and equality therefore work together. If an offender receives the punishment he deserves, and if all those similarly situated receive the punishment they deserve, then each offender will not only have been treated justly, he will also have been treated equally compared to all those similarly situated.").

categorically excluding them from capital punishment results in unjust treatment for similarly culpable non-juvenile and non-mentally retarded offenders.

In *Roper*, the Supreme Court observed that “[b]ecause the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force.”¹⁸⁶ The Court in both *Roper* and *Atkins* seems to have forgotten, however, about the Eighth Amendment rights of those who are still subject to the death penalty, and also about its own prior commitment to the Eighth Amendment principle that capital punishment must be imposed fairly and consistently or not at all.¹⁸⁷ The categorical exclusions adopted in *Atkins* and *Roper* make it easier to believe that the death penalty can indeed be imposed justly, but the real result of these decisions might well be that capital punishment is both less fair and less consistent.¹⁸⁸

¹⁸⁶ *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

¹⁸⁷ See cases cited *supra* note 179.

¹⁸⁸ The possibility that increased constraints on imposing the death penalty will make capital punishment only seem more fair has been suggested by many scholars. See, e.g., Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 77 (2002) (“Is not there a risk that these reforms may lead to the worst of all worlds: the appearance of careful and fair review coupled with the practical certainty that relief will be denied each time? This ‘legitimation effect’ is one of the most damaging aspects of the current death penalty review scheme.”); Joshua Herman, Comment, *Death Denies Due Process: Evaluating Due Process Challenges to the Federal Death Penalty Act*, 53 DEPAUL L. REV. 1777, 1889 (2004) (“If the general population is induced into believing that the capital punishment system is reliable because of legitimating reforms, wrongful capital convictions will continue to mount and the risks of wrongful convictions and executions will not subside.”); Steiker & Steiker, *Sober Second Thoughts*, *supra* note 3, at 436 (“[T]he elaborateness of the Court’s death penalty jurisprudence fuels the public’s impression that any death sentences that are imposed and finally upheld are the product of a rigorous—indeed, too rigorous—system of constraints.”); Scott E. Sundby, *The Death Penalty’s Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1963 (2006) (noting the risk that after *Atkins* and *Roper*, “the public may feel that the most unfair applications of the death penalty have been banished without realizing that more subtle but every bit as deadly problems can still persist” (footnote omitted)).